

1997

MERCOSUR as an Instrument for Development

Jorge M. Guira

Follow this and additional works at: <https://scholar.smu.edu/lbra>

Recommended Citation

Jorge M. Guira, *MERCOSUR as an Instrument for Development*, 3 LAW & BUS. REV. AM. 53 (1997)
<https://scholar.smu.edu/lbra/vol3/iss3/5>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

MERCOSUR as an Instrument for Development

Jorge M. Guira*

In July 1990, Argentina and Brazil announced their intention to form a common market, MERCOSUR or Mercosul (Portuguese), by 1995.¹ Later that year, Paraguay and Uruguay asked to become part of this integration process.² On March 26, 1991, Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asunción (Treaty), establishing each of the signatories' intention to create a united common market by December 31, 1994.³ This common market, pursuant to Article 1 of the Treaty of Asunción, provides for the free movement of goods, services, capital, and labor by the end of the December 31, 1994 transition period.⁴ The MERCOSUR signatories also proposed the establishment of a common external tariff (CET), coordination of macroeconomic policies, and harmonization of national legislation.⁵ Of these four objectives, the establishment of a CET (albeit with

* Jorge M. Guira, B.A., M.A., J.D. (UF), LL.M. (Lond.), Research Fellow in Latin American Financial Law, London Institute of International Banking, Finance and Development Law, Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London. This paper represents an initial review of current developments in MERCOSUR in a cross-disciplinary context. It is the beginning to an extended treatment of the above subject, under the supervision of Professor J.J. Norton, S.J.D., D. Phil., the Sir John Lubbock Professor of Banking Law at the Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London. The author gratefully acknowledges the assistance of Professor Norton in the preparation of this paper. Any errors or omissions are the responsibility of the author alone.

1. *Acta de Buenos Aires*, 15 INTEGRACION LATINO AMERICANA 67 (1990).

2. Thomas A. O'Keefe, *An Analysis of the MERCOSUR Economic Integration Project from a Legal Perspective*, 28 INT'L. LAW. 439, 439 (1994).

3. Treaty Establishing a Common Market, Mar. 26, 1991, Arg.-Braz.-Para. Uru., 30 I.L.M. 1041 [hereinafter Treaty of Asunción].

4. *Id.*

5. *Id.*; Thomas A. O'Keefe, *MERCOSUR: The Next Steps*, Address at the American Bar Association (ABA) Young Lawyers Division Conference on MERCOSUR: The New Common Market of the Southern Cone, with Perspectives from the European Union and the NAFTA (Feb. 12, 1995). It should be noted, however, that over 9,000 types of goods will come in force under the CET. *International Agreements; Presidents of MERCOSUR Nations Ratify Common External Tariffs*, 11 Int'l Trade Rep. (BNA) No. 33, at 1268 (Aug. 17, 1994).

myriad exceptions) and the free movement of goods has been largely achieved.⁶

Membership into MERCOSUR may be created by utilizing various different methods. MERCOSUR signatories may allow member states of the parallel organization, the Latin American Integration Association (LAIA), to become full members of MERCOSUR.⁷ Another option is associate membership through a so called "4 + 1, or Rose Garden agreement" by which states join and receive the benefits of free trade without being locked in to the CET.⁸

Because of MERCOSUR's clear, although limited success, Chile recently sought and was accepted as an associate member of MERCOSUR.⁹ However, the case of Chile, full membership was problematic since its external tariff rates average 11 percent compared to the MERCOSUR wide 14 percent average. This issue, among others, proved a stumbling block in building a full partnership.

Bolivia further joined Chile¹⁰ as an associate member and several other Latin American states, including Venezuela and Mexico, are seeking closer ties with MERCOSUR.¹¹ Additionally, MERCOSUR is attempting to integrate with other subregional and regional organizations, including the Andean Pact in Latin America.¹² Important example is the signing of a new cooperation agreement between MERCOSUR and the European Union (E.U.).¹³

-
6. It should be noted that the common external tariff averages 14% and is levied on all imports to MERCOSUR from non-MERCOSUR countries. It covers approximately 80% of products imported to MERCOSUR. Over 9,000 separate products are included on this list, which includes approximately 80% of the products reviewed in the post-Treaty process period. Moreover, MERCOSUR has seen the implementation of a separate customs agreement through which the signatories have agreed to freely circulate 90% of products exchanged between them as of January 1996. The remaining products will contain limitations up to the year 2000 and an agreement exists to appoint working groups to harmonize limitation of government policies which hinder competition in this regard. Laura C. Reyes M., *Beyond NAFTA-South/Central*, NAFTA L. REV., Spring 1995, at 150-151. See also Reuter Textline, BBC Monitoring Service, Aug. 8, 1995 (list of CET exceptions to be prepared); Michael Reid, *A Survey of MERCOSUR: The End of the Beginning-MERCOSUR Has Achieved Surprisingly Swift Success, But There is Plenty More to Do*, Oct. 12, 1996; Stephen Fidler, *Survey-MERCOSUR Trade Pact Sets the Pace for Integration*, FIN. TIMES, Feb. 4, 1997.
 7. Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672 [hereinafter Treaty of Montevideo of 1980].
 8. See <<http://embassy.org/uruaguay/econ/MERCOSUR>>. The agreement was signed at the White House Rose Garden in the United States. Id. This event was possible because of the Enterprise for the Americas Initiative, which set up free trade areas throughout the hemisphere and is discussed in Parts III and IV, *infra*.
 9. 13 Int'l Trade Rep. (BNA) No.27, at 1096 (July 3, 1996).
 10. 13 Int'l Trade Rep. (BNA) No. 27, at 1647 (Oct. 23, 1996).
 11. 13 Int'l Trade Rep. (BNA) No. 34, at 1348 (Aug. 21, 1996); Reid, *supra* note 6 at P. 16.
 12. Reid, *supra* note 6, at 16.
 13. David Haskell, *Latin Reforms, Democracy Draw European Investment*, THE REUTER EUR.COMMUNITY REP., Apr.17, 1996. See also *MERCOSUR Discussions with Andean Pact*, Reuter Textline, Apr.18, 1996. *ASEAN Seeking Closer Ties with MERCOSUR*, Reuter Textline Business Times Malaysia, Apr. 27, 1996. See also O'Keefe, *supra* note 5, at 7,11 (discussing ties with NAFTA and the EU).
-

The above pattern of expansion shows that states and regional entities increasingly recognize MERCOSUR as a viable legal institution towards which closer economic ties appear viable. The reason for this interest is unmistakable; MERCOSUR represents a potential market of over 200 million persons, \$800 billion annual gross domestic product, and growth in intraregional trade that has been rapidly accelerating in the 1990s.¹⁴

As a result of this growth, commentators typically perceive MERCOSUR as a key element of positive legal and economic reforms promoted by member states.¹⁵ However, whether MERCOSUR will expand its institutional infrastructure beyond its minimalist form and establish a *supranational* bank¹⁶ or attain sustained expansion is questionable. Accordingly, this article explores whether MERCOSUR's new legal order can lead to significant economic integration.¹⁷

Part I provides a conceptual framework to identify how law, in the context of MERCOSUR, can serve as an instrument of development, through legal rulemaking, institution-building, and expanding linkages with other nations as well as subregional and regional organizations. Part II analyzes the core tension between economic liberalism and conservatism, which constrains sustainable national development in Latin America. Next, Part III describes how MERCOSUR, as a generator of legal rules, is affecting intraregional legal unification and harmonization. Part IV discusses how MERCOSUR's institutional framework can provide an instrument for development, with particular attention to the dispute resolution mechanism. Further, Part V examines how MERCOSUR is positioned to grow with respect to other countries and regional entities in the Southern and Northern hemisphere. Finally, Part VI assesses how MERCOSUR is a legal instrument of development.

14. U. Celli, Jr., *The Formation and Consolidation of MERCOSUR*, C1, 5, Address at the ABA Young Lawyers Division Conference on MERCOSUR (Feb. 15, 1995) (on file with author). See, e.g., INTER-AM. DEV. BANK, ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA REPORT (1993); INTER-AM. DEV. BANK WORLD OUTLOOK (1995); INT'L BANK FOR RECONSTRUCTION AND DEV., WORLD DEVELOPMENT REPORT (1995). MERCOSUR trade has grown three fold between 1990-1994, from U.S. \$4.1 billion to \$10.7 billion. <<http://www.iadb.org/idb/int/intpub/nota/mero.htm>>

15. For an interesting discussion of the parameters of an emerging debate as to whether the growth in intra-MERCOSUR trade has arisen due to protectionism which threatens distortions in trade (and thereby reflects the historical pattern of liberalism-conservatism, in oscillation), compare Guy de Jonquieres, *World Bank Softens Criticism of MERCOSUR*, FIN. TIMES, Oct. 29, 1996 with Guy de Jonquieres, *MERCOSUR Trade Group under Fire*, FIN. TIMES, Oct. 24, 1996.

16. See Reid, *supra* note 6. See also MERCOSUR Countries to Establish *Supranational* Bank and Court, 13 INT'L TRADE REP. (BNA) No. 24, at 980 (June 12, 1996); Geoff Dyer, *MERCOSUR Plans Regional Bank*, FIN. TIMES, Dec. 18, 1996 (discussing future bank's conceptualization).

17. See Joseph J. Norton, *Law and Economic Development in the Emerging C.E.E. Economies -- The Case of Securities Regulation -- A New Frontier of Challenges for Applied Comparative Law Methodology*, Address at the Emerging Financial Markets and IFIs Conference (on file with author); Reid, *supra* note 6. See also John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles under a Nafta Based System*, 36 HARV. INT'L L. J. 127 (1995).

I. Law as an Instrument of Economic and Political Development: Defining the Core Issues.

A. THE PROCESS OF LEGAL REFORM.

Legal reform does not exist in a vacuum.¹⁸ Rather, legal reform is a product of social, economic, and political experience. MERCOSUR, as a Latin American legal reform project, emerges from the historical forces which have shaped the development of member states and the region. At the same time, however, MERCOSUR is a unique and new creature because it is: (1) part of a sweeping, ongoing regional and hemispheric liberalization effort; and (2) a project of geographical scope which extends across the diverse, and frequently divided, Southern Cone. Consequently, MERCOSUR represents a potential important departure from the constraints of a complex Latin American history.

The first element in this overall conceptual framework is understanding how the history and the current economic and political situation affects the process of legal reform.¹⁹ The process of legal reform is defined as the means towards which law is used as an instrument to achieve certain ends. In its' regional historical dimension, the focus is the persistent tension between economic liberalism and conservatism in Latin America. This factor sets the stage for how the legal reform process affects economic and political development.²⁰

18. See Norton, *supra* note 17, at 9-10.

19. For a discussion of the concept of the impact of law and development on developing countries and the process therein, see David M. Trubeck, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L. J. 1 (1972). See also LAW AND DEVELOPMENT (Anthony Carty ed., 1992). Part I of the above edited volume contains a useful introduction to the Law Reform process, in particular the setting of useful rules for diverse societies with transplanted legal ideas. A good review of the latest methodological developments in law and development and allied fields is J. Trachtman, *The Applicability of Law and Economics to Law and Development: The Case of Financial Law*, in EMERGING FINANCIAL MARKETS AND THE ROLE OF INTERNATIONAL FINANCIAL INSTITUTIONS (Joseph J. Norton & M. Andenas eds., 1996). In this article, J. Trachtman discusses the emphasis on maximizing social welfare through reduction of transaction costs as the *sine qua non* of the new "comparative institutionalists" who seek to apply culturally sensitive law and economics analysis to the resolution of law and economic development problems. Although not expressly modeled on this approach, the analysis of MERCOSUR here adopts many of the institutionalists' insights by seeking to identify the core tensions in society and then analyzing whether the legal, institutional, and policy devices in place can help resolve these problems. Implicit in this work is the assumption that only a modest, regionally sensitive theory can explain the main reasons for underdevelopment, and that only through a series of processes to gain awareness of these problems and then set incentive mechanisms to cure these problems to grapple with each element one by one.

20. Trubeck, *supra* note 19 at 22, 24. See also Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries*, 1972 WIS. L. REV. 767 (1972).

B. THE SETTING OF LEGAL NORMS AND RULES.

The second element of analysis is understanding that legal reform deals with creating, building, and maintaining norms of conduct in an institutional setting. Norms, those written as well as unarticulated, are means of deciding legal issues. They consist in part of formal rules. In the case of MERCOSUR legal reform, the process of developing norms and law starts with member states.

Member states, through MERCOSUR decision-making bodies, set legal rules which codify the formal norms of the institution.²¹ This exercise of state or organizational power creates, produces, and maintains a legal order which is made of formal rules and custom as well as the means to interpret these rules and custom. Additionally, an enforcement system administers the rules and ensures fidelity to the purpose and intent of the law.

An integration scheme, such as MERCOSUR, also has a hierarchy of law.²² At the highest level is the law of the institution. This law consists of a treaty and other protocols and agreements signed by authorized representatives of member states which apply to all states. Depending on the interpretation of such law, it may also have an effect in national legal regimes.²³ The next level is national law. This law governs economic relationships within each country, except to the extent that MERCOSUR law is supreme.²⁴ National law also includes choice of law rules or private international law governing cross border transactions. A third level which may exist is public international law for signatories' commitments to internationally accepted norms of conduct and institutional law, such as the United Nations General Assembly resolutions, the World Trade Organization (WTO), and the historical norms of the General Agreement on Tariffs and Trade (GATT).²⁵

When legal reformers confront these different layers of law, a typical objective is harmonization and unification of laws to reduce transaction costs in cross-border transactions.²⁶ Thus, it is important to see how the three levels of law contribute to the overall legal framework of integration. The particular focus is identifying the dimensions of

21. See Trubek, *supra* note 19, at 22,24.

22. M. EKMEKDJIAN, INTRODUCCION AL DERECHO COMMUNITARIO LATINO AMERICANO CON ESPECIAL REFERENCIA AL MERCOSUR (1994).

23. *Id.* at 263-64.

24. *Id.* at 264-71. For an extensive discussion of this aspect of the unification and harmonization of law, see Alejandro M. Garro, *Unification and Harmonization of Private Law in Latin America*, 40 AM. J. COMP. L. 587 (1992). This highly complex area is one which is the unique province of lawyers schooled in conflicts of law analysis and a specific understanding of the historical, cultural, and social forces which shape legal discourse and development.

25. This is particularly true in a dynamic historical setting like Latin America which is the product of substantial diversity (e.g., Indian, Spanish, Portuguese, French, Dutch, Roman, English, and American).

26. See generally Trachtman, *supra* note 19, at 35-37. Indeed, the transaction cost reducing model builds on the work of R. Coase that societies which learn how to reduce such social costs to an efficient level thrive. Institutionalists choose to use a broader overall definition which looks at the reduction of such costs. It is therefore implicit in analysis that reduction of costs, such as tariff barriers, will produce superior benefits to society.

MERCOSUR law, showing how such law may affect domestic law, and exploring the tentative harmonization efforts undertaken thus far. The potential of such effort in moderating the tension between economic conservatism and liberalism is discussed in the corresponding institution-building part.

C. THE BUILDING OF INSTITUTIONS.

The third element of analysis is examining the institution-building aspects of MERCOSUR. Analyzing institution-building entails consideration of how policy decisions are made, implemented, and resolved when disputes arise. This is an important dimension of integration because formal rules and custom can only succeed if an effective decision-making process and dispute resolution mechanism exists. The degree to which an institution implements the intent of founders' legislation and administers the law reveals a great deal about norms and the true role of rules in the integration system. For example, measuring and comparing the degree of transparency rather than opaqueness in decision-making reveals the accountability of MERCOSUR institutions in practice. This, in turn, helps uncover the operational code of behavior in the MERCOSUR project. It can therefore expose the tensions between liberalization and protectionism in decision-making. Similarly, focusing on the procedural aspects of dispute resolution can illuminate the role of power versus law in this particular process.

D. THE EXPANSION OF THE INTEGRATION CORE.

A fourth element of analysis is determining whether MERCOSUR has a sufficient legal and institutional predicate to facilitate growth in trade and sustainable development. This question must be considered because the viability of an integration scheme centers around expansion. Accordingly, how core members create linkages with different states and subregional and regional integration schemes is an important focus.

MERCOSUR states face fundamental policy choices regarding whether they should integrate further with states from the North or the South.²⁷ Currently, considerable debate in the academy and policy circles arises over whether North - South integration is preferable to South - South integration. The openness of MERCOSUR's architecture to facilitate such linkages as well as its appreciation of the legal, economic, and geo-political factors, which help decision-makers evaluate the most desirable trade linkage alternative, are important elements of MERCOSUR's problems and prospects for success.

E. THE SUM OF THE PARTS.

The above approach builds upon the methodological contributions of historians, economists, and lawyers, without narrowly following a particular track or "school" of analysis. Historical analysis is used as the base because of the apparent persistence of a conservative-liberal tension which drives policymaking and because it simultaneously promotes attentiveness to the unique cultural and economic conditions of Latin America generally and the MERCOSUR member states specifically. This analysis is particularly relevant to the current situation because the current debate as to the efficacy of MERCOSUR focuses not only on

27. See, e.g., J. DE MELO & A. PANAGARIYA, *THE NEW REGIONALISM IN TRADE POLICY* (1992).

whether trade is being created between the states, but also whether growth of trade within the walls of MERCOSUR is attained at the expense of global competitiveness.²⁸ At least one experienced international trade economist perceives that parties who do not use MERCOSUR as a platform are being shut out of the trade picture due to tariff barriers, with the result that internal liberalization is external conservatism for parties who do not plant a base in MERCOSUR as part of business strategy.²⁹ Legal analysis shows what the key rules are and how they are interconnected to each other. Institutional analysis is used with an eye toward critical analysis of how the relevant bodies facilitate social interactions which reduce transaction costs. In particular, the focus is on how MERCOSUR and relevant national and international institutions can constrain the historical tensions which exist and help the respective member states achieve greater efficiency and equity in their commercial relationships. In this regard, the "institutional analysis" builds upon the insights of history as well as economics in discovering whether MERCOSUR's foundations will allow it to grow strong.³⁰ A review of the prospects for expansion draws on the insights of trade theory and recent diplomatic history to expose the options which MERCOSUR faces and assess their implications for development. An historical discussion is the first step towards explaining the confluence of the above analysis.

II. Resolution of Economic and Historical Barriers and Tensions.

A. BACKGROUND.

A consistent theme in the national history of Latin American states is the tension between economic liberalism and conservatism.³¹ Economic liberals welcome foreign investment and the development of a market economy in a democratic state. Economic conservatives prefer state intervention and typically seek to restrict foreign ideas and influences which open the economy and society to outside economic and political forces. This factual context is crucial.³² Whether the focus is the history of national economic development or subregional integration, decisionmakers' primary question is how to best harness the region's export-oriented economies for the benefit of society.

28. See the discussion of this important emerging issue in the two articles by de Jonquieres, *supra* note 14. A response from libertarian quarters suggesting that trade creation rather than trade diversion is the most significant underlying economic development taking place is in Edward L. Hudgins, *MERCOSUR Gets "Not Guilty" on Trade Diversion*, WALL ST. J. EUR., Mar. 24, 1997, at 10.

29. Hudgins, *supra* note 28.

30. See J. Trachtman, *supra* note 19, at 29-32 (discussing the importance of Douglass North's pioneering work as to the centrality of transaction costs to achieving development in society).

31. THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* (3d ed. 1992).

32. This general theme is explored in detail in Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995). See also DAVID BUSHNELL & NEILL MACAULAY, *THE EMERGENCE OF MODERN LATIN AMERICA IN THE NINETEENTH CENTURY* (1992).

33. SKIDMORE & SMITH, *supra* note 31, at 11-14.

The persistent tension between liberalism and conservatism is further evident in the economic and political history of Argentina and Brazil. But other important factors inform the prospects for economic integration.³³ Additionally, a general, persistent Latin American distrust of a major trading partner, the United States, exists. This distrust of foreign ideas usually manifests itself in ambivalence. Nationalistic antipathy toward too close an embrace with its Northern neighbor arises while countries simultaneously pursue North American or Western European style "technical" progress.³⁴

Moreover, neighboring Latin Americans have harbored deep suspicions about each other. This suspicion has led to political conflict, including war. Regional fragmentation, rather than integration, has therefore been the rule rather than the exception. Concerns about protecting national sovereignty and avoiding foreign economic dependency have also quashed many national ambitions for crossborder economic alliance.³⁵ As a result, hemispheric, regional, and sub-regional integration efforts, despite many attempts, have invariably failed.

This state of affairs summarizes the context for national and international relationships leading up to the signing of the MERCOSUR project and its implementation. It can provide important clues about the enhanced prospects for sustainable development via MERCOSUR.

Moreover, because Argentina and Brazil are the two most important member states in MERCOSUR, these two states deserve special attention with respect to their place within this theoretical regional context. Consequently, these states are featured throughout the discussion and highlighted in subsection II(C).

34. *Id.*

35. Rich and extensive literature exists on direct foreign investment in Latin America. A detailed discussion of historical and current means to control foreign investment is discussed in Joseph J. Jova et al., *Private Investment in Latin-America: Renegotiating the Bargain*, 19 TEX. INT'L. L. J. 3, 12-13 (1984). A voluminous literature exists on export and foreign capital dependency. Dependency theory has many different aspects to it but the primary point of view is that Latin-American economies are at the mercy of economies of the North because they are at the periphery of the international trading system. Accordingly, they do not have the resources to maintain an equal bargaining position in their dealings with the outside, more advanced industrial world. This leads to a variety of pernicious deals in which domestic elites work with foreign elites to enrich themselves to the detriment of others in the population. See, e.g. FERNANDO CARDOSO & ENZO FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* (M.M. Urquidí trans., 1979); LATIN AMERICA: *THE STRUGGLE WITH DEPENDENCY AND BEYOND* (Ronald H. Chilcote & Joel C. Edelstein eds., 1974); ANDRE GUNDER FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA* (1967); IMMANUEL WALLERSTEIN, *THE MODERN WORLD SYSTEM: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD ECONOMY IN THE SIXTEENTH CENTURY* (1974); PETER EVANS, *DEPENDENT DEVELOPMENT: THE ALLIANCE OF MULTINATIONAL, STATE, AND LOCAL CAPITAL IN BRAZIL* (1979).

B. THE FIVE PHASES OF MODERN LATIN AMERICAN DEVELOPMENT: THE PERSISTENT TENSION OF ECONOMIC LIBERALISM VERSUS STATE INTERVENTION IN EXPORT ORIENTED ECONOMIES.

Since its early 19th century independence from the colonial empires of Spain and Portugal, outsiders to the region have often viewed Latin America as "the land of tomorrow".³⁶ These early 19th century revolutionary governments varied widely in their political organization and their economic policymaking.³⁷ One constant, however, remained; policy veered from the tenets of liberalism to a conservative reaction.

Economic liberals, during this pre-modern period, focused on the creation of open market policies and the promotion of capital, including foreign investment.³⁸ By contrast, economic conservatives favored development of domestic trade and sought protection for local agriculture, artisan, and craftsman industries.

Concepts of economic liberalism throughout the period were borrowed from countries in the midst of mass production industrialization, particularly England and France. European liberal concepts of openness to the global economy were heavily influenced by the need for these advanced manufacturing states to export. But unlike the advanced nations of Western Europe, Latin America had not yet undergone significant industrialization.

Indeed, large scale industrialization did not really begin in Latin America until the 1930s, well after the importation of liberal concepts concerning the role of the state and markets in contemporary economies.³⁹ Conservatives, either because of nationalism or strong interests in the fate of domestic industries, reacted strongly to transplanted liberal ideas and policies. Direct state intervention, with a tightening of the entry and exit rules for foreign investment and nationalization of selected industries, followed the conservatives' recurring rise to power and influence.⁴⁰

This pattern of liberal-conservative "cycles" exists today. Amy Chua, for example, argues that many Latin American states are currently undergoing their fifth cycle - a resurgence of liberalism, dressed up as privatization.⁴¹

Regional scholars have also periodized Latin American economic growth and development, primarily based on changes in the export orientation of the economy.⁴² These cycles sometimes correspond to the above articulated patterns of liberal-conservative ascendancy and decline.

The starting point for chronicling economic growth and development is during the 1850s. When national governments consolidated their power and increased integration

36. See SKIDMORE & SMITH, *supra* note 31, at 382.

37. See BUSHNELL & MACAULAY, *supra* note 32, at 22-32.

38. *Id.*

39. See LATIN AMERICAN ECONOMIES: GROWTH IN THE EXPORT SECTOR, 1880-1930 (Roberto Cortes Conde & Shane Hunt eds., 1985).

40. See generally Chua, *supra* note 32. Chua's article focuses on ethnic tensions just underneath the surface which are exacerbated by the repeated cycles of privatization and liberalization. Therefore, as some observers feel, liberalization does not represent a panacea for development.

41. *Id.*

42. SKIDMORE & SMITH, *supra* note 31, at 43-66.

into the global economy was the defining economic characteristic. This phase of development led directly to the first "modern" period, from 1880-1900, which began the Latin American pattern of export-led growth in a few primary products.⁴³

The historical record during this first modern period also reflects a tendency toward the centralization of political authority. Liberals, of course, championed economic development through export growth.⁴⁴ Such political promotion helped attract and maintain foreign capital flows. Foreign capitalists welcomed liberal centralism because they believed it provided safety for their financial interests and was closely tied to overall political stability. Domestic oriented interest groups sometimes opposed liberalism because its proponents wanted to open up the domestic market to their detriment.

The second phase from 1900 - 1930 was a period of expansion in export import trade, consolidation of centralism, and with it, prosperity.⁴⁵ Argentina, for example, had a growing economy and a standard of living for its citizens which was on a par with Australia and the United States.⁴⁶ Brazil's coffee and rubber-based primary products economy was also growing, but this prosperity was not widely shared.⁴⁷ Liberalism did not bring progress without a price: the price being increased poverty and a multi-tiered, but not always socially mobile, society. Consequently, liberalism waned in influence as nationalism grew in response to the wide and uneven distribution of international trade profits.⁴⁸

One aspect of increasing disenchantment from liberalism was that domestic agricultural interest groups increasingly clamored for protection from the threat of international competition.⁴⁹ Such groups successfully protected their stake in foreign trade through these tactics. As a result, competing voices, advocating spending scarce state resources in the growing industrial sector, did not stand a chance.⁵⁰ This conflict did not help a domestic industry which lacked the ability to compete in the global economy with reasonably priced products. Moreover, industrial interest groups lacked the power to bargain, either internally or internationally, for the kind of investment needed to succeed in the industrial marketplace.⁵¹ Consequently, development of this sector lagged.

In the 1930s, a third phase began, featuring import substitution industrialization (ISI). This phase, lasting through the 1960s, was marked by many shifts in state policy

43. *Id.*

44. *Id.*

45. *Id.* at 48-53.

46. CARLOS F. DIAZ ALEJANDRO, *ESSAYS ON THE ECONOMIC HISTORY OF THE ARGENTINE REPUBLIC* (1970); *THE POLITICAL ECONOMY OF ARGENTINA 1880 - 1946* (Guido di Tella & D.C.M. Platt eds., 1986); *POLITICAL ECONOMY OF ARGENTINA 1946 - 1983* (Guido di Tella & Rudiger Dornbusch eds., 1989) (useful for comparison purposes of the earlier economic period).

47. E. BRADFORD BURNS, *A HISTORY OF BRAZIL* (3d ed. 1993).

48. SKIDMORE & SMITH, *supra* note 31, at 49-53.

49. *Id.*

50. *Id.*

51. VICTOR BULMER-THOMAS, *THE ECONOMIC HISTORY OF LATIN AMERICA SINCE INDEPENDENCE 194-224* (1994) (general discussion of relationship in different economic sectors between productivity, interest groups, and other factors).

toward the treatment of industry.⁵² ISI is the state's policy of encouraging and protecting investment in domestic industries and erecting tariff barriers against foreign goods in order to substitute foreign industrial goods with domestic products. This phase was characterized initially by a diminished international demand for the primary products which made up the bulk of Latin American trade. However, the fall in demand was not brought on by a lack of competitiveness. Rather, the international financial collapse of the great depression meant that the citizens of more advanced western states had less money to spend thereby diminishing demand.⁵³

Before the great depression, Latin American policy makers had more or less accepted liberal ideas uncritically. But exports fell 48 percent from 1930 to 1934 as compared to 1925-29, and this meant that the old pieties of export-led growth gave way to the realities of a difficult period for international trade.⁵⁴

Domestic political crisis followed depression. Military leaders took over Argentina, Brazil and five other countries within a year of the 1929 crisis.⁵⁵ All the while, a new era in economic planning and matching legal reform began. States tried to make the transition from the old liberal, export-led model to a mixed model focusing more on the development of domestic industry. Argentina, for example, attempted to keep the best of the old model with the Roca-Runciman Pact. In this trade deal, the Argentine and the British governments agreed to English quotas for Argentine products in exchange for Argentina's assurances to purchase certain goods and ensure British business interests in Argentina.⁵⁶

At the same time, Argentina and Brazil were actively stimulating industrial development through increased state involvement and promotion of industrial growth. Foreign products now faced even greater barriers. Conservatives, sometimes in the guise of populism, usually supported these measures.

The policy of ISI, based on erection of tariff barriers, state purchasing of local goods, and state run enterprises, was to create a new industrial middle class and elite class.⁵⁸ But Latin American products could not compete without expensive imported capital goods (such as technology) which substantially raised production costs. Latin America also lacked a broad market beyond its borders. This broader market was highly competitive.⁵⁹ Therefore, inward growth was stunted in the face of these external constraints.

52. *Id.* at 235, 245, 281. See also SKIDMORE & SMITH, *supra* note 31, at 53-56. There is a wealth of material describing ISI's effect on inhibiting development. The major point is that inward-looking development made less sense than the traditional export-led growth model because Latin America did not have enough resources to compete productively in the world economy, or, even if it did, protectionism removed incentives to compete.

53. *Id.* SKIDMORE & SMITH, *supra* note 31, at 53-56.

54. *Id.*

55. *Id.*

56. BULMER-THOMAS, *supra* note 51, at 218, 238.

57. *Id.* at 17, 234, 244.

58. *Id.*

59. *Id.* Probably the best survey covering this issue, including the so called structuralist school of Raul Prebisch and other scholar-advisors, is included in CELSO FURTADO, *ECONOMIC DEVELOPMENT OF LATIN AMERICA: A SURVEY FROM COLONIAL TIMES TO THE CUBAN REVOLUTION* (2d. ed 1976).

The fourth phase from the 1960s through to the 1980s saw even greater stagnation in ISI growth. The phase was defined by the rise of military governments who tried to control the rising collective power of labor often without even trying to put a populist face on their quest for control.⁶⁰ But maintaining the ISI policy was becoming problematic for reasons beyond labor unrest. Foreign capital goods needed for growth were expensive and businesses which benefitted from the paternal protection of political patrons did not become more productive.

Accordingly, increased state investment and protection of domestic industries did not result in further industrial development. Domestic industries lacking a comparative advantage which could drive down the costs of production faced a steady erosion in their international competitiveness. At the same time, organized labor started to become more militant and was demanding concessions to match those of privileged industrialists.⁶¹ Governments in many Latin American countries, including Argentina and Brazil, were faced with stagnant or declining industries and the challenge of organized labor increasingly demanding higher wages. Latin American governments also faced a fall in international lending. Such capital was sorely needed to support the declining flow of revenue in their regimes.⁶² Slowly, but inexorably, economic pressure from without and within was building up.⁶³

In response to this domestic situation, the military stepped in. The result was the rise of anti-labor internationally-oriented bureaucratic authoritarian governments which tried to establish stronger ties with international financial institutions and multinational corporations.⁶⁴ Such international ties were thought necessary in order to raise capital flows. In this task, success was achieved, perhaps too well.

The 1970s saw external credit rise dramatically in the financial sector for the stable, bureaucratic authoritarian regimes of the region. But the lack of financial discipline from borrowing governments made debt service rise.⁶⁵ By the end of the decade, debt had risen from \$27 billion to \$231 billion, with \$18 billion in debt service.⁶⁶ Even without major gains in productivity, this burden might have been sustainable since the nominal rate of interest on the debt was below the rate of growth of nominal exports. But debt service which had been 17 percent of exports in 1960, was now 43.4 percent of export earnings and commodity prices were falling.⁶⁷ Economic disaster soon followed.

60. *Id.*

61. See SKIDMORE & SMITH, *supra* note 31, at 56-59.

62. *Id.*

63. *Id.*

64. *Id.* The financial institutions and multinational corporations which were involved in these alliances were typically from the United States or other developed creditor countries.

65. There are a variety of books describing the development of so-called bureaucratic authoritarianism. An early influential work is GUILLERMO O'DONNELL, *MODERNIZATION AND BUREAUCRATIC AUTHORITARIANISM: STUDIES IN SOUTH AMERICAN POLITICS* (1979). Another useful study is ALFRED STEPAN, *THE MILITARY IN POLITICS: CHANGING PATTERNS IN BRAZIL* (1971) (discussing the role of the military as intervenor in Brazilian politics).

66. SKIDMORE & SMITH, *supra* note 31, at 59.

67. *Id.*

The fifth phase, from 1980s to the present, began by a deepening of the financial and resulting social crisis until a tortuous path to democratization and reliberalization emerged.⁶⁸ The early 1980s, despite the crisis, witnessed even more government borrowing as banks perceived the shortfall in commodity prices making up the export base as temporary. It was not. By 1982, the debt service to export ratio climbed dramatically to 59 percent. The situation had gone from bad to worse.⁶⁹

The International Monetary Fund (IMF) stepped in as international disciplinarian. In exchange for repudiation of ISI, the IMF helped the region's troubled economies, including Argentina and Brazil, by helping them cover their international debt. The basic program of IMF was "structural adjustment", which is essentially the same as the "Washington Consensus" or the New Economic Model (NEM).⁷⁰ These programs are based on broad concepts of liberalizing trade policy, welcoming foreign investment, reducing state intervention, and fighting inflation.

Not surprisingly, these reforms, which induced the pain of economic recession on its citizens, were unpopular. The military leaders, who were now presiding over increased unemployment and a general economic recession, now faced increasing discontent and a narrowing domestic base of support amid the squeezing pressure applied to the society.⁷¹

Increasing dissent and participation of this middle class in 1990s politics slowly led to a peaceful transition to democracy and the return of liberal reformers. But now Latin American citizens voted to take hardship in the short run pursuit of long term gains. Capital flows in the region consequently resumed with Mexico and Argentina receiving significant new amounts.⁷² Bonds and equities replaced syndicated loans as the preferred form of foreign investment.⁷³ Privatization reforms, particularly in Argentina, also began to take shape, particularly in Argentina but also in various other parts of the region.

However, despite these positive factors or, perhaps, in part, because of them, a new crisis emerged which has had important hemispheric implications. Buoyed by rising foreign investment, Mexico's currency became increasingly high relative to its underlying value on the international market, namely, its ability to pay foreign obligations with dollar reserves. The current account faced a huge deficit. As a consequence, Mexico's current account dilemma turned into a crisis as the peso devalued.⁷⁴ Suddenly illiquid, Mexico struggled in the face of a massive international lack of confidence in Mexico's international economic management. As a result, its NAFTA partner, the United States, stepped in with a pack-

68. *Id.* This is also the thesis of EVANS, *supra* note 35. Two particular studies which describe the emergence of financial problems in the 1970s and the 1980s are R. Fernandez, *The New Financial Regime in Latin America*, in *THE NEW ECONOMIC MODEL IN LATIN AMERICA AND ITS IMPACT ON INCOME DISTRIBUTION AND POVERTY* (V. Bulmer-Thomas eds., 1996). See also S. Griffith-Jones, *International Capital Flows to Latin America*, in *THE NEW ECONOMIC MODEL IN LATIN AMERICA AND ITS IMPACT ON INCOME DISTRIBUTION AND POVERTY* (V. Bulmer-Thomas eds., 1996).

69. BULMER-THOMAS, *supra* note 51, at 363-365.

70. This basic program consists of trade liberalization and financial liberalization. See BULMER-THOMAS, *supra* note 51, at 10, 53, 76, 371.

71. See SKIDMORE & SMITH *supra* note 31, at 103-06, 179-82.

72. See BULMER-THOMAS *supra* note 51, at 369-77.

73. See Griffith-Jones, *supra* note 68, at 129-32.

74. D. Arner, *The Mexican Peso Devaluation Crisis*, NAFTA L. REV., Winter 1996.

age of loans and guarantees to stabilize the currency. This bailout eased the crisis and brought stability, but the need for the bailout had significant implications beyond Mexico. These implications were nicknamed the "tequila effect."

The peso devaluation meant that investors in the capital markets not only retreated from Mexico, but also, to a more limited extent, from elsewhere in Latin America. But the Mexican crisis did not become a Latin American collapse. Indeed, the United States' reaction contained the crisis, and Latin American economies continued to move along and be judged by investors in the market on a country by country, sector by sector basis. However, short term results were severe. Argentina, for example, briefly lost a greater percentage of deposits in its domestic banking system than the United States did during the Great Depression of the 1930s. But, the Cavallo Plan to peg the peso to the dollar, along with tight money, helped stem the tide of domestic liquidity and Argentina sufficiently restored its finances to resume a stronger current account balance with which it could pay off creditors in dollars. Foreign investment, therefore, has generally boomed in the most recent period not only to Argentina but also to other national economies demonstrating policymaking trends toward stability and efficiency in politics, trade, and the capital markets while Brazil was also affected, the effect was more limited because even though it had its own set of currency problems relating to control of inflation, it had a unique set of stabilization and monetary plans in place to raise and maintain the value of its currency.

The above general themes apply to two major MERCOSUR countries, Argentina and Brazil, which were previewed in this section and are encapsulated below. Uruguay and Chile also follow the same general pattern.⁷⁵ Paraguay, on the other hand, has a unique history and pattern of development. Nevertheless, it is characterized by many of the same themes, including a recent return from military government to new, although fragile, liberal policies.

Historians have typically characterized Paraguay as a nation of strong men. Although Argentina and many other nations have had their caudillos or "the man on horseback" step in to play unifying roles, in Paraguay, such figures are even more prevalent. This is the fundamental political distinction between Paraguay and other MERCOSUR member states; Paraguay's Conservative-Liberal rivalry in political parties is more than a century old. One example of the strong man tradition is the conservative "democratic" rule of Paraguay by General Alfredo Stroessner from 1954 - 1989.⁷⁶ Strongly emphasizing the development of the agriculture and forestry industry, Stroessner remained in power until he was overthrown by General Andres Rodriguez. General Rodriguez instituted liberal reforms and was followed by democratically elected Juan Carlos Wasnoy. Political and economic liberalization continued and a 1996 military coup attempt was undertaken, but squelched.⁷⁷

75. See THE CAMBRIDGE ENCYCLOPEDIA OF LATIN AMERICA AND THE CARIBBEAN, (Simon Collier et al. eds., 2d ed. 1992).

76. *Id.* at 278-79.

77. *Id.* at 277-78. See *EP President Haensch Condemns Coup Attempt in Paraguay*, REUTERS NEWSMEDIA, Apr. 24, 1996.

C. KEY SIMILARITIES IN THE ARGENTINE AND BRAZILIAN EXPERIENCE.

Despite Brazil's greater geographical size, Argentina's greater citizen education level, and distinctions between Brazil's Portuguese and Argentina's Spanish colonial origins, both of these Latin economic powers are remarkably similar in many respects. Both nations have experienced a history of export - orientation, populist "corporatism", ISI experimentation, military in politics (as a moderator), and oscillations between liberalism and state intervention as a means to stimulate economic development.

Brazil's economy during the First Republic (1889-1930) was dominated by the alliance of coffee, large landowners, and foreign⁷⁸ ideas and capital.⁷⁹ The rise of Getulio Vargas in a 1930 military coup saw a return to the neo colonial pattern of state intervention found throughout Latin America.⁸⁰ Nationalization of business was the order of the day through the establishment of a corporatist style of governance. Under this model, business and the state would work together to promote industry. This approach lasted until Vargas was overthrown in 1945 and a brief flirtation with liberalization re-emerged.⁸¹

Vargas's return to power in 1950 signaled a return to state intervention in the economy generally. Nationalization of key industries figured prominently in his plans.⁸² But a 1964 military coup saw a return to economic liberalism, even though such policies soon fell out of favor. In the next decade, more state enterprises were created than any previous era.⁸³ Military rule ended in 1985, and President José Sarney, through Fernando Henrique Cardoso, have, in varying degrees, pursued increased liberalization in the trade and financial dimension.⁸⁴

The inability of Brazilian creditors to pay debt and the rise of inflation to stratospheric levels proved major obstacles to economic stability. As a result, the IMF prescribed, and Brazil adopted, repeated stabilization and various liberalization programs to pull Brazil out of its trough.⁸⁵ The hallmark of Brazil's recent stabilization efforts is President Cardoso's "Plano Real", formulated when he was finance minister and implemented since July 1994.⁸⁶ The objective of the plan is to keep foreign investment flowing and the economy consistently surging through a variety of tools to fight inflation by keeping the Brazilian currency close to its American counterpart. The result has been a drop in inflation from a 640 percent annual rate to between 12-18 percent.⁸⁷ Despite this impressive achievement, some concern exists with another aspect of the Plano Real, tight monetary

78. *Id.*

79. Probably the best book on this period, although it focuses on the development of British ties with Brazil, is RICHARD GRAHAM, *BRITAIN AND THE ONSET OF MODERNIZATION 1850-1914* (1968).

80. See THOMAS E. SKIDMORE, *POLITICS IN BRAZIL, 1930-1964: AN EXPERIMENT IN DEMOCRACY* (1967). See also BURNS, *supra* note 47, at 346-47.

81. See generally *id.*

82. See also THOMAS E. SKIDMORE, *THE POLITICS OF MILITARY RULE IN BRAZIL, 1964-1985* (1988).

83. See SKIDMORE & SMITH, *supra* note 31, at 182-84.

84. *Id.*

85. *Id.*

86. See SALOMON BROTHERS, *EMERGING MARKET DEBT STRATEGY AND CURRENCY RECOMMENDATIONS* (1997).

87. See SKIDMORE & SMITH *supra* note 31, at 88-92. See also PETER H. SMITH, *POLITICS AND BEEF IN ARGENTINA: PATTERNS OF CONFLICT AND CHANGE* (1969); D. ROCK, *ARGENTINA 1516-1987: A STUDY IN CONTRASTS* 263 (1987).

policy and loose fiscal policy. This concern uncovers Brazil's ability (or inability) to repay its foreign obligations due to its large current account deficit. This concern is counterbalanced by the strong overall growth in trade, the record \$8 billion in foreign direct investment, and the fact that Brazil's inflow of foreign money currently helps provide adequate reserves for its current account deficit.

Argentina has also oscillated from conservative state intervention to liberalism in much the same way. The late 19th century to 1930s was marked by a liberal regime whereby foreign investors and domestic landowners controlled a disproportionate degree of wealth. Juan Peron became President in 1946 on a nationalist and populist theme challenging this concentration of wealth and alliance of power.⁸⁸ In response, an experiment in corporatism and state intervention, with five year economic plans, was implemented.⁸⁹

A key component of this idea was an alliance between the military and labor. Peron's new corporatist vision of a state mediating conflicts between functional groups of workers, industrialists, and farmers was created in addition to a nationalization program. This was followed by various swings back and forth from liberalization to state intervention. A reaction to Peronism in the 1970s and 1980s saw the generally economically liberal military leadership rise and fall.⁹⁰ In the 1990s, the military left power and President Carlos Menem was elected to power.⁹¹

A resurgence of liberalization, including privatization, and a massive opening up of the financial system to dollar-denominated deposits then took place. The drive toward accumulating dollar deposits occurred to peg an Argentine peso pegged with dollar reserves. Argentina succeeded in its economic stabilization effort, bringing inflation from triple digits down to under 4 percent.⁹² This does not mean, of course, that stabilization has not been bought at a price. After an easy period of growth due to the inflow of foreign private money, reduction of the state sector and other problems have led to high levels of unemployment.

D. POST WORLD WAR II: HEMISPHERIC, REGIONAL, AND SUBREGIONAL INTEGRATION SCHEMES.

Throughout the post World War II period, Brazil and Argentina forged various bilateral links of integration. They also participated in the United Nations-based Economic Commission for Latin America (ECLA), which proposed subregional integration in 1949.⁹³ This led directly to the formation of the Latin American Free Trade Association (LAFTA) in 1960.⁹⁴ Eleven countries, including Brazil, Argentina, and Mexico coordinated economic integration through this scheme. The basic idea of LAFTA was a customs union whereby tariffs on products would be reduced in successive rounds of negotiation over a

88. SKIDMORE & SMITH, *supra* note 31, at 87.

89. *Id.* at 93-96.

90. *Id.* at 100-106.

91. *Id.* at 106-112; Fernandez, *supra* note 68, at 107-108.

92. See, e.g., B. M. CARL, *THE EUROPEAN COMMUNITY AS A MODEL FOR DEVELOPING NATIONS: TRADE AND BUSINESS IMPLICATIONS* (1986).

93. J.M. VECHINO, *INTEGRACION LATINO AMERICANA: FROM ALAALC TO ALADI* (1983).

12 year period.⁹⁵ Unfortunately for the member states, this idea broke down. Easy concessions were achieved in the first few rounds and triumph hailed. Hard bargaining, however, followed this phase. Reconciling the differing objectives of many diverse Latin American states was difficult and LAFTA's ability to cohesively promote economic integration stalled. Indeed, the last two scheduled rounds of negotiation were not held. Weaker states were concerned that the stronger states of Argentina, Brazil, and Mexico had too much economic bargaining power.⁹⁶ The final result was no gain in trade between the LAFTA member states. Indeed some commentators perceive that LAFTA was basically a vehicle for internal ISI growth which weakened Latin America's trade prospects through protectionism, which in turn limited true export growth outside the continent for manufactured products. The formation of a successor entity, the Latin American Integration Association (LAIA), followed next, in 1980.⁹⁷

The Treaty of Montevideo, which created the LAIA, became the foundation for a process which slowly, but successfully, achieved a limited number of tariff concessions among its members.⁹⁸ Under this framework, member states retained the flexibility to form bilateral links through treaties. These linkages were treaties of partial scope in which the benefits an LAIA member granted to a third party through individual bilateral deals were also granted to other LAIA members. This is known as a most favored nations clause. A related development was the formulation of rules of origin. Through this device, LAIA member states were classified into groups depending on their gross domestic product. Those countries who were less developed needed a smaller percentage of their products produced in their country to qualify for preferential treatment in the LAIA system, vis a vis products from the outside.

The period during the 1980s, the diplomatic, political, regional organization, the Organization of American States (OAS), chose to focus on harmonization of private law and issues, rather than directly grapple with regional economic integration.⁹⁹ The OAS silence was not, however, of the deafening kind. Integration was merely a low priority for members struggling with transitions to democracy and debt reduction. But with President Bush's announcement of the Enterprise for the Americas Initiative (EAI), the OAS re-emerged as one catalyst for change in this area.¹⁰⁰

In President Bush's 1989 speech announcing the EAI, the United States stated that it was committing itself to a new era where investment replaced debt, trade was liberalized, and hemispheric integration via the completion of a free trade area by the year 2005 would be achieved.¹⁰¹ This announcement signaled a departure from the United States' passivity to its direct engagement in economic integration. One byproduct of the EAI, which led to

94. See, e.g., CARL, *supra* note 92, at 22, 41.

95. *Id.*

96. *Id.*

97. *Id.*

98. Treaty of Montevideo of 1980, *supra* note 7.

99. O'Hop, *supra* note 17, at 134.

100. See Remarks Announcing the Enterprise of the Americas Initiative, June 27, 1990, in 1 PUB. PAPERS 873.

101. *Id.*

meaningful regional integration, was the eventual signing of a variety of bilateral trade deals in Latin America, including the 1991 Rose Garden or 4+1 agreement structure, whereby free trade agreements (FTA) could be realized with the United States through a series of FTA's in Latin America and NAFTA. The EAI policy, and its successors, reversed a decade of United States' reticence in Latin American hemispheric economic integration and laid the groundwork for regional pacts.

Previously, a variety of efforts at another level, subregional integration between Latin states, had surfaced and then submerged again in the 1960s and 1970s.¹⁰² In general, commentators suggested that nationalism, protectionism, and difficulty in coordinating various regimes of varying sophistication and size barred progress. Moreover, narrow, articulated interests expressed concern loudly and effectively over the possibility that the United States dominate the newly integrated market. Proponents of state interventionism and its close correlate, nationalism, dominated the political economic landscape. Nationalism and conservatism therefore became insuperable barriers to the formation and maintenance of meaningful regional integration.

During the period up to 1986, national decisionmakers in Argentina and Brazil also considered the prospects for integration between them and classified it a peripheral issue. Instead, national decision makers focused on implementing "structural" reform pursuant to ISI driven policies, and later responding to the external debt crisis with IMF driven stabilization.

That subregional or even bilateral integration was low on each country's economic priority list is not surprising; most existing foreign trade was beyond the continent. Moreover, those subregional integration schemes which did manage to get off the ground were likewise creatures of the state intervention anti-foreign bias of most Latin American governments. The Latin American models which existed, such as the Andean Pact, were not viewed as success stories in attracting and retaining foreign investment. Indeed, MERCOSUR is so different than the Andean Pact that it may well have served as a model for what to avoid in considering regional integration.

The Andean Pact established in 1966, was set up as a centrally planned economy integration model.¹⁰³ Its goal was to form a subregional common market among Chile, Colombia, Venezuela, Ecuador, and Peru, minimize the power of multinational corporations (MNCs), and provide special privileges to member states in the region. The Andean Pact failed to produce substantive economic benefits for a variety of reasons. First, its markets were too small. Ineffective state intervention supporting ISI needed large markets to produce economies of scale to reduce production costs and be competitive. Primary product export markets were also small. Likewise, controlling MNCs, while politically popular, meant that restrictive clauses in the law limited or wiped out MNCs control, and this further limited the ability¹⁰⁴ of the Andean Pact to attract foreign technology and

102. O'Hop, *supra* note 17, at 138-39. For example, Carifta and Caricom were set up for the Caribbean Area.

103. The Bogota Declaration was the basis for the establishment of the Andean Pact, although it was not the Treaty itself. See INTERAM. INST. OF INT'L. LEGAL STUDIES, INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA.

104. THE CARIBBEAN 3 (1975). The respective treaties are the Agreement Establishing the Andean Development Corporation, Feb. 7, 1968, 8 I.L.M. 940; Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910.

investment - without any domestic technological or savings base to supplant it.

By 1976, the Andean Pact was unraveling.¹⁰⁵ First, a liberalizing Chile dropped out.¹⁰⁶ Second, disputes were starting to break out over interpretations of Andean law. The underlying problem was that law was not uniformly recognized as supreme in national courts. Thus, the limited protections which investors had in Andean law were vitiated in national courts. The solution was the establishment of a body of *supranational* law or some other measure to reduce uncertainty. Such reform was forthcoming by 1979, but it was too little, too late. A fractious Andean Pact continued to suffer further declines in foreign investment.¹⁰⁷

Since 1989, however, the Andean Pact became increasingly liberalized, with a repeal of draconian constraints on foreign investment law and most recently, cuts in external tariffs.¹⁰⁸ This illustrates along with the confluence of U.S., as well as Brazil and Argentine initiatives, a growing consensus toward greater integration.

In fact, in the late 1980s and early 1990s, a sea change in the perception of the importance of integration at various levels, as well as the various types of liberalization took place. The confluence of these international and regional factors contributed substantially to the early talks between Brazil and Argentina in 1986, and beyond, which laid the groundwork for the establishment of MERCOSUR.¹⁰⁹ A key factor, in addition to the above U.S. EAI initiative, was that trading blocs consisting of the United States, Japan, and the E.U. were emerging as geographic regional cores. Absent a strong inelastic demand product base, various efforts at South-South integration had generally failed to achieve the aspirations of their members. Further, the General Agreement on Trade and Tariffs (GATT) system was generally attuned to reducing barriers for industrial goods.¹¹⁰ This achievement took place in a series of tariff reduction rounds since the 1960s for member states. Members included nearly all the world's economies so that participation in the GATT was essential to gain entry into most markets on nondiscriminatory terms. GATT did not address, however, the primary export products of Latin America in agriculture - and these products were highly protected world wide.¹¹¹ But it did provide some working global legal and economic framework from which countries could seek to promote industrial, agricultural, and services market niches where they could best sell their products.

105. *Id.*

106. O'Hop, *supra* note 17, at 142.

107. *Id.*

108. *Id.*

109. See also E.J. Cardenas, *The Regional Approach to Hemispheric Integration: A Modular Approach Towards Free Trade*, 1 Sw.J.L. & TRADE AM. 49 (1994).

110. *Id.* at 51.

111. See Agreement Concerning a Council on Trade and Investment, June 19, 1991, Arg.-Braz.-U.S.-Uru., 30 I.L.M. 1034 (background notes).

E. THE REGIONALIZATION OF WORLD ECONOMIES AS ADDITIONAL IMPETUS TO LIBERAL REFORM AND POTENTIAL EMERGING OBSTACLE.

In this environment of global integration, Argentina and Brazil took the lead to forge links with each other and form the MERCOSUR Common Market. Although a diplomatic history of how the MERCOSUR agreement came about is yet to be written, recognition of a more integrated world economy within designated geographic groups must have influenced Brazil and Argentina to follow suit in the Southern cone. Additionally, both countries began looking to each other as partners and concretized 24 different protocols of economic cooperation in the 1980s toward this end. Consequently, it was not surprising that as the global trading market became more difficult to penetrate for these debt-ridden states, they sought to strengthen economic linkages with each other. In their negotiations, both countries swayed to the familiar dance of integration, namely a search for expanding market access while protecting selected goods. This logic helped propel the already liberal-oriented governments of Argentina and Brazil toward seeking greater export-led growth and revitalized development through reduction of tariffs and greater access to the market of their neighbors.

This liberal model, in marked contrast to centrally planned integration models like the Andean Pact for the Northern part of Latin America and the loose confederation of the LAIA, well reflects the primacy of the NEM/Washington Consensus during the most recent decade. In this climate of emergent regionalization of trade and domestic financial crisis in a global setting, MERCOSUR started to take root.

Nonetheless, it cannot be ignored that a significant school of thought believes that the regionalization of world economies has started to lead to a variety of protectionist "fortresses" of trade. Such configurations, it is argued, are not working to create more trade through the early efforts of liberalization. Rather, these efforts are breaking down the global trading system through the erection of regional blocs who attempt to use their bargaining power to engage in domestic protectionism against the rest of the world. Whether this argument appears to have merit in the context of MERCOSUR's current expansion alternatives is amplified in Part VI.

F. THE RELEVANCE OF MERCOSUR.

History is oblique coming in from the side. Accordingly, the narrative synthesis provided is only moderately useful in preparing decisionmakers for the challenges which will likely surface. Nevertheless, an appreciation of this background can inform current thinking about MERCOSUR by forewarning of past dangers to economic integration and to a long life span for liberalization. Thus informed, social analysts can draw their own conclusions about how the sui generis facts of the moment are linked to the antecedents of the past. And decisionmakers can analyze and help guide MERCOSUR along a path which alleviates historical tensions.

Certain tentative "lessons" can be drawn from the above history, namely that some type of crude liberal-conservative cycles appear to exist and that increased protectionism results, or at least coincide sometimes, with the conservative part of the cycle. These fundamental challenges constitute the fabric of historical barriers and tensions and must be resolved. Therefore, the next step is determining how MERCOSUR can alleviate the effects

of these historic themes. The answer to that problem lies inevitably in an ongoing process of social, legal, and economic reform. Law has a central role to play in this process, through MERCOSUR, by providing a means to transform or at least modify economic and social behavior. These steps are as follows. First, MERCOSUR can provide legal rules which can help move the overall process of legal reform forward. This includes the current, carefully balanced linear path toward greater liberalization, as well as a potential moderating role for MERCOSUR vis-à-vis nationalism and the creation of a more harmonized legal regime. Second, MERCOSUR must provide institutions which have the means to advance such ends. In this regard, a dispute resolution mechanism which is certain, stable, and predictable is important for attracting foreign investment and preventing nationalistic tensions between member states. Moreover, this framework should help attract foreign investment and stimulate trade. Third, expansion of MERCOSUR to the North must factor in concerns about dependency and the deep-rootedness of related concerns about encroachments on national sovereignty by foreigners. Although none of these elements guarantee economic growth and development, proper policy making can mitigate social tensions which develop when state engages in protectionism, which diverts more trade than it creates.

As the above section shows, the Latin American economy, with its typically export-oriented foundation, has oscillated from a stop and go pattern of conservatism to liberalism. The focus of Part III is how the legal framework of MERCOSUR fits within this context.

III. Legal Rulemaking Dimension and the Unification and Harmonization of Law.

A. LEVELS OF ANALYSIS AND LEGAL SOURCES.

In order to understand how MERCOSUR operates, the starting point is asking how the legal framework works. Next, the key questions are what are the objectives of the legal rules, what do these rules say, and how is the development of a body of law through MERCOSUR progressing. Each question is examined in turn.

A regional integration scheme such as MERCOSUR consists of law at treaty level, national law, and public international law. The highest level of law is the original or treaty law. In MERCOSUR, debate arises as to the original source document because MERCOSUR is a member of the LAIA as well as a separate entity. Some commentators identify the key relevant documents as the 1986 Buenos Aires Act to integrate Argentina and Brazil, as well as the guidelines contained in the LAIA, December 1990, Economic Complementation Accord No. 14 (ACE No. 14).¹¹² Still others trace the origins of MERCOSUR and relevant treaty law to the 1980 Treaty of Montevideo because of its role as the original framework document for the LAIA.¹¹³

112. To compare varying perspectives as to the effect of the Buenos Aires Act and ACE No.18, see EKMEKDJIAN, *supra* note 22, at 147-82, 261, and O'Keefe, *supra* note 5, at 439-41. See also C.E. Colauti, *El Tratado del Mercado Comun del Sur: Respuestas e Interrogantes*, REV. JCA. ORG. LA LEY (1993-D).

113. *Id.*

Regardless of which document is perceived as the true formulation for MERCOSUR, it is nevertheless clear that ACE No. 14, which was signed by the four original signatories, is part of MERCOSUR law. Indeed, the LAIA and MERCOSUR are, in certain respects, parallel organizations. MERCOSUR's key provisions are set out in the Treaty of Asuncion and this Treaty is incorporated by reference in ACE No. 18, following the ratification of the Treaty by the four signatories' legislatures.¹¹⁴ The treaty is virtually substantively identical to ACE No. 18.¹¹⁵ A significant distinction from the earlier ACE No. 14 is that ACE No. 18 contains the parties' agreement to establish the decision making bodies and other institutions of MERCOSUR administration.

The legal sources at the community or MERCOSUR level are carried forward in various protocols through the exercise of signatories, based on the Treaty of Asuncion's constitutional powers to engage in further agreements.¹¹⁶ These legal sources are administered by MERCOSUR legal institutions. These institutions have international legal personality. Member states who have signed the above various documents are therefore acknowledging them as sovereign obligations which they are obligated to respect. Law, at this level, may next be classified with respect to the extent that member states have certain commitments to abide by the provisions in an express or implied manner, depending on the text of the particular provision. Likewise, the law may contain a permissive or mandatory text depending upon the the terms of the text itself (for example, 'shall' as opposed to 'may'), interaction between the text and custom of the particular law or regulation in MERCOSUR (for example, developing norms of MERCOSUR law), and the particular national legal regime (controlling, providing guidance, or subordinate). The extent to which member states are bound to abide by the provisions of the Treaty and its' successor legal sources can therefore be a complex and evolving process, despite the seeming presence of "black letter" provisions which appear to present certain legal conclusions in a virgin legal fora. This issue is made more complex and important by the fact that no supranational judicial authority exists to enforce the legal status of MERCOSUR law. Moreover, the status of MERCOSUR law varies within each state, raising the possibility of more uncertainty in legal dispute resolution.

The Protocol of Ouro Preto (OPP) states that the legal sources of MERCOSUR are the Treaty of Asuncion, its' Protocols, and additional or supplementary instruments, agreements concluded within the Treaty framework and its protocols, and decisions of various bodies of MERCOSUR since the entry into force of the Treaty of Asuncion.¹¹⁷ This level of law for the decision making bodies of MERCOSUR is derivative of the original power. It includes decisions of the Common Market Council (Council), resolutions of the Common Market Group (Group) and directives of the MERCOSUR Trade Commission (Commission). Importantly, Article 42 sets forth that the above MERCOSUR organ's decisions "shall be binding and, when necessary, must be incorporated in the domestic legal systems in accordance with the procedures provided for in each country's legislation." (e.s.).¹¹⁸

114. *Id.*

115. *Id.*

116. Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR ("Protocol of Ouro Preto"), Dec. 17, 1994, Arg.-Braz. Para.-Uru., art. 41-42, 34 I.L.M. 1244 [hereinafter OPP].

117. *Id.* at art. 42.

118. *Id.* at art. 7.

A review of the above indicates that the derivative law of MERCOSUR is intended to have mandatory application in domestic legal systems. However, this does not mean that such law is necessarily supreme to that of other domestic laws. Internal conflicts of law rules would then come into place to determine how to resolve this dilemma.

Substantively speaking, the Council, as the legal personality of MERCOSUR and its highest organ, issues decisions, which are internal to the MERCOSUR states, and signs agreements on behalf of MERCOSUR with third parties, such as foreign governments. The Group can issue binding resolutions and various working sub-groups can also make recommendations.¹¹⁹ A provision also exists for sectoral agreements in which business persons from each of the member states convene to engage in discussions about facilitating development of complementary (or competing) economic products in their respective industrial sectors. Such meetings and accords are implemented to take advantage of each country's economic strengths and to advance technology transfer and form larger, better markets.¹²⁰ This provision is contained in the LAIA arrangements.¹²¹

National or domestic law follows in the classification scheme. Although such law is technically not a part of MERCOSUR law, in the sense that it is incorporated in the MERCOSUR Treaty(s), awareness of the member states' laws is critical to analyze the effect which MERCOSUR law can have on MERCOSUR's web of economic laws and regulations. On a practical level, domestic legal systems can further implementation of liberalization or make it more difficult, if not impossible. This is true even if no direct conflict takes place.

For example, in a customs harmonization matter, a related revenue provision makes a customs provision, which intends to streamline border procedures, impossible to implement.¹²² Moreover, an exception in a commercial piece of domestic legislation, which is seemingly intended to apply to a national issue area, impacts MERCOSUR as well thus making the same hypothetical customs provision's streamlining goal impossible to achieve. Such legal development, while technically not inconsistent, can stymie harmonization profoundly even though it is indirect. Therefore, analysis of complex specific national laws is an integral building block element of harmonization on an issue by issue basis.

With respect to public and private national law, various harmonization efforts have already been undertaken by MERCOSUR member states on a regional level as to broader Latin American issues.¹²³ On the private law level, the OAS has for many years convened an Inter-American judicial committee (IAJC) which has been conducting the Inter-American specialised conferences on private international law (CIDIPs).¹²⁴ Five CIDIPs have taken place since 1975, with the focus on conflicts of law and judicial cooperation.¹²⁵ On the other hand, Latin American states have been reluctant to join certain international

119. *Id.* at art. 9-14.

120. *Id.* at art. 5d. Practical examples of areas in which such efforts exist are services, transport, communication, and agriculture. <<http://www.invertir.com>>.

121. See the discussion of this issue in EKMEKDJIAN, *supra* note 22 at 92-100; cf. OPP, *supra* note 116, at art. 5d.

122. An extensive customs code, protocol, and lists of procedures exist in law to reduce customs problems. <<http://www.embassy.org/uruguay/econ/MERCOSUR>>.

123. See Garro, *supra* note 24, at 589-601. See also D. HARGAIN, G. MIHALI, REGIMEN JURIDICO DE CONTRATACION MERCANTIL INTERNACIONAL EN EL MERCOSUR (1993).

124. Garro, *supra* note 24, at 591.

125. O'Hop, *supra* note 17, at 164-65.

conventions, such as certain Hague Conferences on private international law and Unidroit, because of a preference for a regional approach.¹²⁶ Accordingly, the past record shows significant hemispheric wide efforts have been undertaken to harmonize and unify private law in domestic states and on an international level, to resolve interstate private law conflict. This is a particularly salient area of legal development since commercial disputants desire certainty and stability in law, and such harmonization is helpful in reducing conflicts between individual parties in states.

Current efforts toward harmonization of law within MERCOSUR have begun logically with the individual states' initiatives in the institutional framework of MERCOSUR and the below described relevant efforts at the national level. For the MERCOSUR law itself, the legal sources are the decision frameworks of the Group and Council as well as any other entities such as the JPC, which is to consider harmonization and specially appointed MERCOSUR ad hoc groups. The effect of such MERCOSUR law depends upon the legal regime in each member state, specifically, the extent of authority which MERCOSUR has in the relevant national hierarchy of law. This in turn depends on the legal structure of the particular regime.

As to the national laws themselves, five different legal groupings exist in Latin America.¹²⁷ Countries such as Chile and Argentina are heavily influenced by the French civil code but have adopted original devices.¹²⁸ Uruguay's legal structure resembles that of Argentina, Brazil, and Chile because of the above historical influences.¹²⁹ Brazil's law, however, reflects codes that arose in the early twentieth century and represent a different private law tradition.¹³⁰

Nevertheless, all of the member states have civil law traditions. However, this is not to minimize the variety of constitutional structures that exist as well as the idiosyncratic cultural norms that have arisen to help the lawyer determine how the law is actually applied in different national contexts. Accordingly, it appears that at the broadest level, significant distinctions exist between the various groupings. Convergence of law is therefore more readily directed toward specific issue area reforms.

Despite whatever differences may exist in styles of rulemaking, the core of economic and financial regulation sheds light on the making of directives at the broader MERCOSUR level in order to transcend the boundaries which exist between nations. Such work has been slow to commence, but slow change has occurred in certain critical issue areas, such as customs harmonization since the most recent Fortaleza Summit.¹³¹ The final level of analysis is the public international law dimension. The Ouro Preto Protocol states that MERCOSUR has international legal personality. Whether this transforms MERCOSUR into an organ of supranational authority is discussed in Part IV(D).

126. *Id.* See also Garro, *supra* note 24, at 594-95 n.38.

127. Garro, *supra* note 23, at 606-07.

128. *Id.*

129. *Id.*

130. OPP, *supra* note 116, at art. 34.

B. ORIGINS AND OBJECTIVES.

A review of the terms of MERCOSUR show that it is essentially a customs union with a CET rather than a more basic free trade area or a more advanced common market economic union with total economic integration.¹³²

The dimensions of economic integration must be defined because this provides a working definition of MERCOSUR itself, as well a base of comparison with other entities such as NAFTA. A free trade area is the most primitive form of integration. This consists of an entity which removes tariff and quota type restrictions on goods among the member states.¹³³ A customs union consists of a free trade area with a CET.¹³⁴ A common market combines these factors, plus the free movement of goods and the free movement of services, labor, and capital.¹³⁵ An economic union also harmonizes macro-economic policies.¹³⁶ Total economic integration is similar to federal, state, or community relationships in that each of the relevant states retain certain powers while overarching economic and social policies, affecting the entity as a whole, reside in a binding, decision-making body with *supranational* authority.¹³⁷

C. CORE TREATY RULES.

Annex 1 to the Treaty contemplated duty free trade among MERCOSUR member states by the close of 1995.¹³⁸ The four Presidents' agreement superseded Annex 1 stating that implementation of a free trade area was delayed until 1999 for Argentina and Brazil, and the year 2000 for Paraguay and Uruguay.¹³⁹ In the earliest stages, an extensive list of products exempt from MERCOSUR's tariff reduction schedule was drawn through the "transitional phase" to January 1, 1995.¹⁴⁰ Exemptions for the post-1995 post-transitional "interim" phase were also drawn up and have been further reduced.¹⁴¹ The overwhelming

131. Geoff Dyer, *MERCOSUR Nations Drive Ahead Through Some Tricky Terrain*, FIN. TIMES, Dec. 28, 1996. See also R.R. RUA Boiero, *MERCOSUR: La Fortaleza de la Cumbre de Fortaleza (Segunda Parte)*, PERIODICO ECONOMICO TRIBUTARIO-EDIC. LA LEY, Mar. 3, 1997.

132. See O'Keefe, *supra* note 5, at 1-3.

133. See BELA BALASSA, *THE THEORY OF ECONOMIC INTEGRATION* 2 (1962).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Treaty of Asunción, *supra* note 3, at Annex I.

139. See O'Keefe, *supra* note 5, at 3.

140. *Id.* This includes 950 items for Uruguay, 427 for Paraguay, 221 for Argentina, and 29 for Brazil. The goal is obviously zero by the year 2000 (1995 for Brazil and Argentina). Autos and sugar are excluded. *Id.*

141. *Id.* The post January 1995 period reflects 11 CET levels from 0-20% with 300 initial exemptions (399) for Paraguay whittled down through 2001 (and 2006 for Paraguay). Two other groups subject to special arrangements are capital goods tariff convergence by 2001 at 14%, and informatics and telecoms to 165 by 2006. Brazil had temporarily been allowed to raise tariffs on 150 goods in 1996, with 50 exemptions for Argentina and the other countries allowed as a special concession. This has changed in that Brazil, during the course of the year, reduced their exemption to 68. *Trade Policy: Brazil Announces Plans to Reduce Products Exempt from MERCOSUR*, 13 Int'l Trade Rep. (BNA) No. 17, at 721 (May 1, 1996).

majority of goods currently do not contain any tariffs with certain notable exemptions in capital goods (for example, information and telecommunications equipment).¹⁴²

Annex I of the Treaty provides for the rules of origin provision of the agreement. The rules of origin can determine who is entitled to receive preferential treatment under MERCOSUR's tariffs.¹⁴³ The essential test is whether a good is either native or sufficiently transformed within the region so as to be characterised as a new "local" product under the pre-existing LAIA classification system.¹⁴⁴ One of the numerous constraints set forth states that more assembly will not qualify a product for local preferential treatment.¹⁴⁵ Rules of origin apply to those products which are exemptions to the CET because they are deemed by national authorities to require special protection. Those rules are still in existence for the limited number of products which are still exempt.¹⁴⁶

Annex IV provides safeguard clauses up to December 31, 1994.¹⁴⁷ This clause provides a member country with the capability to impose a numerical quota on goods from another MERCOSUR country if a sudden rise in imports substantially harms or threatens to harm the country's economy and it can prove that such rise is due to subsidized exports or dumping.¹⁴⁸ This type of clause has been extended and is intended to ensure that the regional market is fair and that national governments do not bow to powerful domestic industrialists seeking special privileges, i.e. protection from competition.¹⁴⁹ These substantive rules are still in place and are the subject of continuing reform along with a full set of harmonized competition rules to be implemented by the year 2005.¹⁵⁰

Article 5(d) of the Treaty lays out provisions for sectoral complementation of goods. Under these provisions, which have included at least one major sector (steel), the goal is for similar industries to work together to become competitive on the international market.¹⁵¹ Subsequent agreements, such as the Protocol of Colonia, have conversely identified various sensitive sectors, such as telecommunications or financial services, which are off-limits to foreign investors or highly regulated.¹⁵²

142. O'Keefe, *supra* note 5, at 5-6.

143. *Id.* No more than 50% of a finished good's Free on Board (FOB) value does not reflect the cost, insurance, freight (CIF) price of extra regional components so that the good will be entitled to extra-preferential treatment. *Id.*

144. *Id.* at 26-27.

145. *Id.*

146. Reid, *supra* note 6, at 5.

147. Treaty of Asunción, *supra* note 3, at Annex X.

148. *Id.* These safeguard clauses have recently been updated and will undergo further change with a full scheme of implementation and accompanying competition rules by the year 2001. See R.R. RUA Boiero, *MERCOSUR: La Fortaleza Argentina en Fortaleza*, PERIODICO ECONOMICO TRIBUTARIO LA LEY, Dec. 30, 1996; Boiero, *supra* note 130.

149. Reuter Textline, Dec. 9, 1995.

150. See Dyer, *supra* note 30; Boiero, *supra* note 131, at 144.

151. *Id.* See also H. Berkemeyer, *El Mercado Común y el Derecho de la Competencia*, LA LEY (1993-D).

152. *Protocolo de Colonia*, in, *MERCOSUL NO CONTEXTO LATINO-AMERICANO* 115-121 (Marcos Simao Figueiras ed., 1994).

The telecommunications sector has recently been deregulated in Brazil so that privatization can begin there.¹⁵³ Argentina has also deregulated the telecommunications industry and along with all participating MERCOSUR countries, the recent worldwide WTO accord will open up the market to foreign investors in this sector in the next few years.¹⁵⁴

Finally, article 7 of the Treaty provides that goods of one MERCOSUR country are entitled to the same internal duty or tax treatment as internal goods. The elimination of tax obstacles to cross border transactions, including double taxation treaties, is essential to facilitating the flow of investment.

As previously discussed, the legal structure of MERCOSUR contains various organs, which have different decision-making capabilities. Moreover, the Brasilia Protocol and the Ouro Preto Protocol establish dispute settlement rules and a dispute settlement mechanism. These respective institutional innovations are discussed in the next part on the institution building aspect of the MERCOSUR project.

D. EFFECT ON DOMESTIC LAWS AND THE ISSUE OF SUPRANATIONAL AUTHORITY.

Three core questions arise with respect to MERCOSUR's effect on domestic law. First, what is the direct effect of MERCOSUR law? Is such law supreme or subordinate in the various member states? Second, what is the indirect effect of MERCOSUR law? Is it serving to assist in the liberalization program of domestic laws? Third, can legal unification and harmonization of laws assist in alleviating the persistent tension between economic conservatism and liberalism, or does it merely transfer the problems of member states to another level? These questions will be discussed in turn.

To look at the direct effects of MERCOSUR law, the starting point is to return to the provision contained in article 42 of the OPP. This provides that MERCOSUR law *shall* be incorporated into each country's national law, where necessary, by the respective legislature.¹⁵⁶ Two points arise. First, what happens if MERCOSUR law is not adopted as part of domestic law? Second, when are circumstances 'necessary' to trigger a national legislature to engage in such a response? The OPP does not contain an enforcement mechanism which makes a member state incorporate MERCOSUR law.¹⁵⁷ Nevertheless, the Joint Parliamentary Commission (JPC) exists, which is set up in the OPP to speed up entry into force of the Article 2 organs' decisions by the respective national parliaments as well as

153. L. Trevisan (Visiting Fellow, Institute for Latin American Studies, University of London), *Privatization in Brazil* (on file with author). See also *Brazil Report*, June 28, 1996 (discussion of various directives needed to implement telecommunications reform); Pinheiro Neto, *Doing Business in Brazil*, Jan. 1997. Brazil's telecoms sector will require \$100 billion in new capital as it undergoes privatization in the next five years for April 7 forward.

154. See *Telecoms Survey*, FIN. TIMES, March 1997. The overall market growth in a global scale is estimated at \$1 trillion in 10 years, due to liberalization. Argentina's two biggest telecoms duopoly, Telecom and Telefonica, have been provided special concessions by the Argentine government in the last few years in exchange for heavy investment. Opening up telecoms is therefore not expected soon but is still under consideration. *Id.*

155. Treaty of Asunción, *supra* note 3, at art.7.

156. OPP, *supra* note 116, at art. 42 (emphasis added).

157. It should be noted that OPP art. 38 indicates state parties are to take steps to ensure MERCOSUR law is incorporated in state law. OPP, *supra* note 116, at art. 38.

assist in the harmonization of laws relating to the integration process.¹⁵⁸ Although this process has limitations, it suggests that MERCOSUR is serious about advancing the legal harmonization process, notwithstanding the existence of certain priority areas, such as nontariff barriers, which continue to have significant unresolved problems.¹⁵⁹

Moreover, even if harmonization were in fact proceeding more quickly, the place of MERCOSUR law within a given national system varies and therefore imposes constraints on achieving uniformity. Argentina, for example, currently accepts the idea of a *supranational* legal order.¹⁶⁰ Chapter 4, article 75, section 24 of the Argentine Constitution provides regional integration law, such as MERCOSUR, with such status.¹⁶¹ The 1988 Brazilian Constitution, article 4, contains a provision encouraging integration but otherwise has no effect.¹⁶²

In light of the above level of effort and current set of legal constraints, some commentators perceive broad unification and harmonization as far away on the horizon, if not impossible. This perception seems accurate and is due perhaps to MERCOSUR's (1) focus on establishment of the CET and free movement of goods over any of the other four initial Treaty objectives, and (2) the allocation of institutional resources to crises in various areas, such as resolving the dispute between Argentina and Brazil over automobile tariffs.¹⁶³ Moreover, the process of harmonization is slow. Also, efforts to achieve such law reform is purposeful but slow, outside of reciprocal privileges for university degrees and licenses, other educational related initiatives, and specialized areas which arise on an ad hoc basis at ministerial meetings.¹⁶⁴

On the other hand, some indirect effects for 'spill-overs' of MERCOSUR rulemaking and economic activity exist which are highly positive. Perhaps the clearest and most noteworthy concurrent development has been the creation of 'bi-national corporations' between Argentina and Brazil.¹⁶⁵ These bi-national enterprises allow national treatment

158. OPP, *supra* note 116, at 25. art. 25.

159. See Reid, *supra* note 6, at 11-12. See also EKMEKDJIAN, *supra* note 22, at 269-73 (discussing the pyramidal structure of BP, article 19 decision making). Ekmekdjian argued that MERCOSUR law is not *supranational* and therefore is not properly included in the sources of law which can serve to fill in the gaps for legal decisions. Whether this changed by the fact that the OPP provides MERCOSUR with international legal personality is an interesting point of evolution. Moreover, the author's emphasis on the legal infrastructure (e.g., the process) contained in the Treaty of Asunción and the most important protocols is not to minimize other important achievements such as acceptance of the Basle capital adequacy guidelines, limited harmonization of rules for joint participation in, for example, the Buenos Aires and Sao Paulo stock exchanges (with common rules for public offerings and mutual funds to be put in place throughout MERCOSUR in the Protocol of Colonia and succeeding working groups), and various other protocols on defense of the consumer, fair competition, and false origin certification. *Id.*

160. See CONST. ARG. 75-24.

161. *Id.*

162. See Brazilian Federative Constitution, C.F. art. 4 (1994 revised ed.).

163. See generally Reid, *supra* note 6.

164. See O'Keefe, *supra* note 5, at 4.

165. See Raul A. Etcheverry, *The MERCOSUR: Business Enterprise and Joint Ventures*, 39 ST. LOUIS, U. L.J. 1979 (1995); M.C. Marsili, *La Armonizacion de las Legislaciones Societarias de los Paises del MERCOSUR*, LA LEY 1994.

for corporations and although development of this legislation is not directly tied to MERCOSUR itself, it is obviously the product of the integration efforts of Argentina and Brazil during the most recent period.¹⁶⁶

The next level of analysis is whether MERCOSUR law alleviates the persistent tension between economic conservatism and liberalism. This question, at this stage of MERCOSUR's growth, fundamentally relies on the realization of institutions which can, over time, effectively carry out liberalization. Because this question is primarily related to institution building, it is discussed in Part V (B).

E. PROSPECTS FOR UNIFICATION AND HARMONIZATION.

The prospects for broad unification of law within MERCOSUR seem far off. This should hardly be a source of surprise. Each of the respective member states have a strong national identity and a particular legal system which has evolved and undergone unique historical development. Moreover, member states' laws are based on different origins. No one model seems suitable, much less likely to gain universal acceptance from such diverse neighbors. Nevertheless, the presence of MERCOSUR institutions, which legislate, execute, and resolve disputes according to a body of MERCOSUR law, means that some uniform laws are already part of the legal landscape. Therefore, uniformity on the national level between member states awaits the work of law reformers seeking to achieve this transaction cost reducing goal. But, achieving such selected unification of national law does not seem insurmountable, because the technical committees of the Group, the Joint Parliamentary Commission, and ad hoc working groups have been formulated to solve particular problems.¹⁶⁷

To the extent that there are differences in civil code language or Spanish and Portuguese, which make selective unification problematic, harmonization of laws can be attempted to reduce, if not eliminate, conflicts among states as to selected issues. The problem then is what issues should be highlighted for harmonization and what form should they take. The problem is that determining priorities for harmonization is a long and difficult process. Review of the European Union's development in this area shows that the process can take decades, rather than years to complete.¹⁶⁸ Therefore, it is much more logical to speak of an evolving process of harmonization and assessing whether such process seems to be in place and functioning toward the realization of concrete goals. In this regard, there is scant progress to report, with customs harmonization looming as the specific issue area which is proving most troublesome. Nonetheless, the JPC's institutional structure at least provides an institutional mechanism for harmonization. Further, the fact that MER-

166. See Etcheverry, *supra* note 165.

167. *Id.*

168. See e.g., P. Clarotti, *The E.U. as a Model for Financial Market Reform*, EMERGING FINANCIAL MARKETS AND THE ROLE OF INTERNATIONAL FINANCIAL INSTITUTIONS (1996). For the early history and developments from the founding Treaty of Rome up to 1986, see EUROPEAN ECONOMIC COMMUNITY: TRADE AND INVESTMENT (Joseph J. Norton ed., 1986). However, some authors (actually the official Brazilian embassy web page) argue that the proper point of reference is the 1944 Benelux convention between Luxembourg and the Netherlands when a detailed comparison is made of all the relevant elements. See generally Brazil Info/undres <<http://www.demon.co.uk/itamaraty>> (the EEC and BENELUX models).

COSUR has international legal personality should also assist in harmonization. These two elements show that some foundation for substantial progress exists, regardless of whether the lack of *supranational* authority means that MERCOSUR law is not the final determinative source of law that some would like (e.g., the MERCOSUR "lacks teeth" perspective).

The core Treaty rules themselves do not appear to have any direct effect on unification and harmonization, except to the extent that their broad economic purpose is liberalization and this ties in with the objective of legal harmonization. Nevertheless, to the degree that the Treaty's objectives are worked out steadily, it appears likely that the basic plan of economic integration will extend itself into the achievement of further integration with the other objectives of free movement of labor, capital, and services.

IV. The Institution Building Dimension.

A. MEMBERSHIP.

The Treaty, in article 20, provides that any LAIA member can become a member of MERCOSUR.¹⁶⁹ Accession to membership is a process requiring further negotiation as Chile and Bolivia can certainly attest to with respect to their own initiations.

A state may terminate membership in MERCOSUR according to the provisions of article 21 of the Treaty.¹⁷⁰ Two requirements exist. First, sixty days' notice must be provided to the remaining members. Second, states must adhere to the Treaty's trade liberalization program for another two years after the withdrawal of the request becomes effective.¹⁷¹ Interestingly, Brazil and Argentina negotiated an escape clause for themselves in ACE No. 14 allowing either of them to leave MERCOSUR if other member states, such as Uruguay and Paraguay, vote some measure unfavorable to them in MERCOSUR itself.¹⁷²

B. EXECUTIVE AND ADMINISTRATIVE DECISION MAKING STRUCTURE.

The decision-making process of MERCOSUR has solidified in the last five years and grown in power. This sub-part reviews Treaty arrangements from the transitional phase to the present.

Article 9 of the Treaty sets forth the Treaty's general institutional arrangements during the transition period to December 31, 1994.¹⁷³ Article 9 provides for two transitional groups, the Common Market Council and the Common Market Group.¹⁷⁴

The Council is the highest level executive group, consisting of Foreign and Economic

169. See Treaty of Asunción, *supra* note 3, art 20 for further details. Note that LAIA is sometimes referred to by its Spanish acronym- ALADI. *Id.*

170. *Id.* at art. 21.

171. *Id.* This reflects the closer working relationship which Brazil and Argentina already have and appears to reflect their greater bargaining power as well.

172. *Id.* at art. 9.

173. *Id.*

174. *Id.* Cf. OPP, *supra* note 116, at art. 3-15.

175. Treaty of Asunción, *supra* note 3, at art. 10.

ministries of the respective parties and concerned with Treaty compliance.¹⁷⁵ It is primarily set up to engage in economic and foreign policy making so that MERCOSUR member states can iron out differences and speak with one voice.

Next in the hierarchy is the Group, which is the top administrative agency charged with implementing Council decisions and overall Treaty compliance. The Group consists of four representatives from the Foreign Affairs, Economics or its equivalent ministry, another relevant ministry, and the Central Bank for each member state.¹⁷⁶ It was initially comprised of ten working sub-groups related to different policy areas.¹⁷⁷ Private sector representatives are allowed to participate in official workgroup discussions related to specific issues of interest.¹⁷⁸

Neither the transitional Council nor the Group had *supranational* authority. Decisions made by either of these two bodies are reviewable and ultimately decided by each member state's respective legislature. Under article 15 of the Treaty, an Administrative Secretariat was created to handle such matters as meeting coordination and press relations.¹⁷⁹

These transitional entities have become permanent and remain the same in most respects. The major change is that the Group and Council's power has been enhanced with the power to make binding decisions or resolutions. In addition, other ancillary sub-groups have been set up.¹⁸⁰

The structure and functions of the core institutions remain the same in many key respects. The OPP outlines these post transitional institutions as the Council, Group, and Administrative Secretariat.¹⁸¹ The Council remains the highest policy making organ and its duties continue to focus on policy making duties and implementation as well as ruling on proposals of the Group.¹⁸² The Group is still charged with monitoring compliance with MERCOSUR's directives and rules, proposing changes and appointments to the Council, and enforcing its own decisions.¹⁸³

One potentially important change is the power of the Group and the Council. Article 34 of the OPP states that MERCOSUR shall possess international legal personality.¹⁸⁴ This means that when MERCOSUR speaks as a collective body through Council or Group decisions, it speaks as the expression of members' international legal obligations to each other and to others as a collective body. The role which such an international law obliga-

176. *Id.* at art. 10 & 14.

177. *Id.*

178. *Id.* at art. 14.

179. *Id.* at art. 15.

180. *See generally*, OPP *supra* note 116. The work subgroups perform tasks in two functional stages: investigative and policy-making recommendations. These groups are formulated along specialized lines: commercial, customs, technical standards, tax and monetary policy, land transport, sea transport, industrial and technology, agriculture, energy, coordination of macroeconomic policy, and employment, and social security. MERCOSUR: *South America's Common Market—Institutional Structure* <<http://mmonwww.americasnet.com/mauritz/MERCOSUR/english/page04.html>>.

181. *Id.*

182. *Id.*

183. OPP, *supra* note 116, at art. 14.

184. *Id.* at art. 34.

185. *Id.* at art. 15.

tion plays in each country is to the constraints of national legislation, particular treaty obligations, and the Constitution of member states.

Further, article 15 of the protocol states that the decisions of the group, as memorialized by resolutions, are binding on members.¹⁸⁵ However, no express enforcement provision exists indicating what a state could do to ensure compliance with a resolution.

The MERCOSUR Administrative Secretariat is the other remaining post-transitional phase institution.¹⁸⁶ It remains essentially the same.¹⁸⁷ The primary institutional innovation in the post transitional era is the addition of the MERCOSUR Trade Commission (Commission) whose decisions, as discussed below, are binding on state parties.¹⁸⁸ A Joint Parliamentary Commission (JPC) and the Economic Social Consultative Forum (Forum) have also been set up.¹⁸⁹

The Commission is charged with assisting the Group in formulating its trade policies by monitoring application of the policy, reviewing implementation of such policies, and analyzing common trade policies, intra MERCOSUR trade and third country concessions.¹⁹⁰ These include issues such as other trade agreements, rules of origin, free trade zone, unfair trade practices, customs coordination and harmonization, consumer protection, export incentive harmonization, and compliance concerns regarding common offshore tariffs.¹⁹¹ The Commission consists of four designated members of each state party and is coordinated by the respective Foreign Affairs Minister.¹⁹² According to article 20, the Commission has the power through its decisions to make binding directives or proposals.¹⁹³ No express enforcement provision exists here either. The Commission also has the power to form technical committees to carry on its work.¹⁹⁴

The JPC can supply recommendations to the Council through the Group when assisting in the harmonization of laws relating to the integration process.¹⁹⁵ Its 64 members, 16 per state, have a wide degree of responsibility.¹⁹⁶ These functions include informing the respective national congress of relevant matters, recommending action to the Group and Council as to integration matters, and assisting in setting up a prospective MERCOSUR parliament.¹⁹⁷ The JPC is also the principal body charged with harmonizing laws with different states, approving the MERCOSUR budget, and carrying on relationships with non-member states as to technical assistance matters.¹⁹⁸ The Forum consists of members of each state party¹⁹⁹ and its purpose is to make recommendations to the Group.²⁰⁰

186. *Id.* at arts. 31-33.

187. *Id.*

188. *Id.* at arts. 16-21.

189. *Id.* at arts. 22-30.

190. *Id.* at arts. 16 & 19.

191. Mauritz, *supra* note 12.

192. OPP, *supra* note 116, at art. 17.

193. *Id.* at art. 20.

194. *Id.* at art. 19(IX).

195. *Id.* at arts. 25 & 26.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at art. 28.

200. *Id.* at art. 29.

C. BASIS FOR POLICY COORDINATION AND A MODERATING ROLE.

Formal policymaking structures can only provide a partial picture of how MERCOSUR policymaking takes place. The real picture is revealed through an analysis of who has the power, how policymaking disputes are resolved, and how open and ultimately accountable, the decisionmaking process is in practice. These characteristics affect policymaker's ability to affect economic and political liberalization. These questions are addressed in turn below.

The overall formal decision-making structure reflects that each party in the Group, Council, and JPC has proportional representation—one state, one vote.²⁰¹ Despite this proportional voting scheme, it nevertheless appears that Brazil and Argentina command superior economic and political resources. Consequently, their opposition to a proposed decision, resolution, or rule has more potential impact from an operational standpoint, because MERCOSUR's legal structure, including Council decisions and Group resolutions, is democratic.

Obtaining members' assent on a common policy requires great effort toward reaching consensus. Indeed, reaching consensus among the potentially conflicting interests of member states with a different mix of goods to sell is an ongoing challenge. Recent major conflicts regarding the import and export of automobiles between Brazil and Argentina expose this critical tension.²⁰² Accordingly, the "big two"—Argentina and Brazil—dominate but no one country has sufficient power to solely dominate through its institutional arrangements.

Another key question is the role which MERCOSUR's decision-making structure will play in mediating between unproductive domestic pressure groups of member states who seek protection and liberalization-minded reformers. It is still too soon to tell how well such interests will be balanced over the long run. What is apparent is that even though MERCOSUR has limited competencies, lobbying will become a focal point of activity as MERCOSUR rulemaking starts to become more extensive. For the moment, however, observers see that lobbying is focused on the highest ultimate decisionmakers—the presidents and foreign policy, trade, and finance officials in each country. Beyond an understanding of formal structure and the apparent distribution of decisionmaking power among the Council, Group, and other forums, lies the issue of openness in decisionmaking, including clarity of rules, or transparency.

Transparency is an important, but elusive concept for two reasons. One, transparency is an important concept because it is a key measure of how well MERCOSUR functions and is accountable to the public for its decisions.²⁰³ Two, transparency is an elusive concept because the term is susceptible of so many different meanings. Transparency may be defined, in its broadest sense, as an open or clear decision-making process, including following known procedures to arrive at decisions and issuing substantive rules which follow therefrom and are the true basis for implementation of policy.²⁰⁴ Transparency can also be defined by what it is not: opaque decisionmaking processes driven by private interests,

201. *Id.*

202. See Reid, *supra* note 6, at 11 (discussing Sarney-Alfonsín Accord). Interestingly, the Treaty of Asunción and history of subsequent protocols and other documents reflect that automobiles have been excluded from tariff guidelines along with another unique product, sugar.

203. *Id.*

204. *Id.*

without regard for or accountability to, the public.²⁰⁵ Yet these two reasons, despite their apparent simplicity, are troublesome because transparency is a relative term.

For example, an executive official in government typically has the right to have certain conversations with assistants kept confidential.²⁰⁶ Likewise, certain public documents may be privileged and not subject to open public scrutiny.²⁰⁷ Moreover, certain meetings may take place at which public matters are disclosed privately.²⁰⁸ A public institution (for example, central bankers) may fail to disclose the guideline criteria used to make certain decisions. Does this mean that transparency does not exist in these respective circumstances? Unless one adopts an absolute view, the answer is no because in each of the above situations, the confidentiality which is taking place is due to a special circumstance. But in all the above cases, public policy is articulated later in some type of public document which typically lays out the new policy or rule and describes the reason for action. The transparency concept is therefore a matter of degree and definition.

The public nature of decisionmaking in the Group, Council, and JPC suggests that the process will have certain elements of procedural openness which makes for transparently applied rules. This does not mean, however, that the process is necessarily fully open or transparent. For example, no prohibition exists on discussing issues in private and then merely agreeing on privately ratified issues in a public display.

Nevertheless, the fact that clear rules exist which the various states are to abide by suggests that there is an emerging structure of transparency wherein the formal rules are followed to the exclusion of private agendas. This arrangement is superior to the alternative of unwritten norms of doing business or an operational code, including extralegal means such as corruption. In this regard, however, it would help to have a clear system of enforcement with strong penalties to encourage MERCOSUR officials to disclose conflicts of interest and act in the public interest. Further steps to monitor public accountability through disclosure of finances and other relevant information should also be considered on an institutional level.²⁰⁹

The degree of transparency and early commitment to economic and political liberalization are only two measures of success. Just as important is the ability to moderate tensions through a strong institutional structure. So far, member states have opted for a central MERCOSUR with limited powers.²¹⁰ Power for decisionmaking effectively resides in

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. Some commentators could perceive that transparency is subordinate to the need to simply develop a structure which is minimalist. See e.g., Reid, *supra* note 6, at 16-17, 22. See also <<http://invertir.com>>. The principle argument here is that a greater-bigger bureaucracy is needed to resolve issues on a broader and day to day, level. Certainly, truly critical issues, such as customs harmonization and financial harmonization, cannot be addressed until sufficient resources are devoted to the resolution of the problem. However, additional bureaucracy is not necessarily the answer. Rather, the will to set up task forces with a trade creation rather than revenue generation bias (in the customs case, where border delays are a half day or greater) and the creation of sophisticated banking and finance officials working groups to address issues in a focused manner much more important.

210. *Id.*

each of the states, who then hammer out agreements.²¹¹ Accordingly, the question of how MERCOSUR moderates tensions is ultimately a state issue rather than a MERCOSUR issue. Still, to the extent that MERCOSUR's benefits extend to particular states in a way which achieves common overall benefits, public opinion is likely to support MERCOSUR actions which moderate national demands. Thus, even if strong narrow interest group pressure arises, the presence of strong public opinion is a positive factor which should not be discounted at this point.

Moreover, the signatories broad understanding of MERCOSUR relies on a certain degree of liberalization, in various dimensions, to achieve its ends. A state which does not embark on such liberalization or starts on a course in the contrary direction is likely to receive less foreign investment if it adopts a state intervention mentality. Accordingly, one of the most fundamental distinctions of MERCOSUR versus previous sub-regional integration efforts, particularly the Andean Pact, is that it is truly concerned with liberalization.²¹²

In terms of the political liberalization dimension, member states of MERCOSUR recently signed a democracy guarantee clause in response to the recent coup attempt in Paraguay.²¹³ The signing of this clause indicates that the stable political liberalization objective is strong because the guarantee clause provides for the ability of a member state to be removed from MERCOSUR if it adopts a form of government which is not democratic.²¹⁴

D. THE DISPUTE RESOLUTION MECHANISM.

A dispute resolution mechanism is an essential but advanced feature of a trading regime. The two basic documents which are the focal points in the MERCOSUR dispute resolution mechanism are the Protocol of Brasilia (BP) and the OPP, including its Annex.²¹⁵ Both documents set forth institutional structures as well as procedures.²¹⁶ The formal system is principally a legalistic system rather than a power-oriented system because it is centered around the resolution of disputes through adjudication rather than negotiation.²¹⁷ Nevertheless, negotiation is the first optional step in the process for all disputes and it appears particularly important in matters relating to the interpretation of the Treaty and successor documents.²¹⁸ The goals of the dispute resolution system will affect the types of decisions which arise. Accordingly, this sub-part will first review the basic methods used to resolve disputes before analyzing whether such methods contribute to a sound and workable dispute resolution mechanism. The issues of standing and subject

211. *Id.*

212. *See e.g., O'Hop, supra note 17, at 140-44.*

213. *Id. See also Reid, supra note 6, at 6.*

214. *Id.*

215. *See generally* OPP, *supra* note 116; A.G. Bidart, *Un Enfoque Sobre Procedimientos No Adversariales y Arbitrales En El MERCOSUR*, J.A., Jan. 10, 1996.

216. *See generally* OPP, *supra* note 116; BP, *supra* note 199. The concepts of "standing" and "subject matter jurisdiction" are not articulated as such in the respective Protocols. Nevertheless, these terms are used for reader's convenience because they articulate the concepts of who gets to bring a dispute (standing) and what types of disputes the arbitral tribunal may hear (subject matter jurisdiction) in a manner which encapsulates these issues, without loss of substance.

217. OPP, *supra* note 116.

218. *Id.*

matter jurisdiction, settlement, and initiation of a complaint or dispute through resolution are discussed in turn.

The OPP spells out the parties who may participate and the types of dispute which may be heard.²¹⁹ Both states and individuals can participate as parties with standing in a dispute.²²⁰ With respect to disputes concerning the interpretation, application or non-fulfilment of the provisions of the Treaty or agreements included within its framework, decisions of the Council, resolutions of the Group and Directives of the Commission, only state parties can participate (these disputes are hereinafter referenced as Track 1 disputes).²²¹

By contrast, an additional track or process exists regarding complaints to the Commission, which can originate from the national sections of the Commission and can initially be brought forward by state parties or individuals, whether natural or legal persons (hereinafter referenced as Track 2 disputes).²²² The subject matter of such complaints can also relate to controversies as to the interpretation, application or compliance with the Treaty and its various successor documents, as well as the decisions of the Council, resolutions of the Group, and Directives of the Commission.²²³ However, an additional basis for Commission subject matter jurisdiction exists in the form of administrative or illegal actions of the state parties which restrict, discriminate, or otherwise violate the above mentioned Treaty, successor legal documents, and decisions included in the decision-making apparatus.²²⁴

Curiously, although article 1 of the OPP Annex provides for origination of complaints by state parties or individuals, article 2 states that only the complainant state party shall submit its complaint to the Chairman of the Commission.²²⁵ Individual parties therefore do not have standing by themselves to follow through on complaints in the Commission, regardless of whether the complaints involve Treaty interpretation or discrimination type issues. This is an area of ambiguity which could use clarification from MERCOSUR at some point. Complainants before the Commission also have the option of moving directly to the BP dispute settlement process including raising complaints to a Commission setting in addition to the Annex of OPP resolution mechanism steps.²²⁶ How each of these options work in a step by step fashion and the relevant key rules are set out below.

The first step for a state party in a Track 1 dispute regarding interpretation of the Treaty, its successor documents, and the decisions of its organs (hereinafter referred to as article 2 organs) is to engage in direct negotiation, informing the Ministry of the Secretariat and the Group.²²⁷ If such negotiations do not resolve the dispute, then a party may submit the dispute to the Group.²²⁸ The Group will allow each party to present its case, and an expert will be selected from a list to the Group.²²⁹ On conclusion of this

219. *Id.* at art. 43 and Annex to Protocol art. 1.

220. *Id.* at Annex art. 1.

221. *Id.* at art. 43.

222. *Id.* at art. 21.

223. *Id.* at art. 43.

224. *Id.* at art. 25.

225. *Id.* at Annex arts. 1 & 2.

226. *Id.* at art. 21.

227. BP, *supra* note 116, at arts. 2 & 3.

228. *Id.*

229. *Id.* at arts. 4, 6.

process, a recommendation is made and the process is concluded within thirty days of the submission of the controversy for the Group's consideration.²³⁰ If the above procedure does not resolve the dispute, then an arbitral procedure can be utilized.²³¹

No dispute is permissible relating to the jurisdiction of the arbitral tribunal as long as one party submits a dispute.²³² The arbitral panel is composed of arbitrators selected from a list of ten designated arbitrators who are registered with the Administrative Secretariat.²³³ The parties can designate one arbitrator, with the third arbitrator being determined by common assent of the parties.²³⁴ Such arbitrator cannot be a national of either of the state parties and should be named within fifteen days of the date that the Administrative Secretariat communicates the intention to commence arbitration.²³⁵ Other substitute arbitrators can also be named in the event of incapacity.²³⁶ If the parties cannot agree on any of the arbitrators within a fifteen day period, the Administrative Secretariat will appoint their own arbitrator from the respective lists submitted.²³⁷ Moreover, if the parties agree, the Administrative Secretariat may appoint an arbitrator from a list of sixteen arbitrators available through the Group.²³⁸ Such selection can be made at the request of either party.²³⁹ (A provision is also made for multi-party disputes in the sense that two state parties with the same position can also take sides against another party.)²⁴⁰

The arbitral tribunal will fix its own rules of procedure, guaranteeing a fair and equal opportunity to be heard in an expeditious manner.²⁴¹ This mechanism is for the claims of private persons (natural or legal) as to the restrictive practices, discriminatory conduct, or unfair competition arising from member states actions violating the Treaty or its successors, Council decisions, or Group resolutions. Parties are to submit the terms of reference and may have the assistance of lawyers to present their case.²⁴² The tribunal also has the power, in the event of irreparable harm, to award interim relief.²⁴³ The parties, legal sources can consist of the Treaty, successive provisions, as well as applicable principles of

230. *Id.* at arts. 5 & 6.

231. *See generally id.* at ch. IV.

232. *Id.* at arts. 7 & 8. Of course, this literal language is likely subject to a common sense interpretation. For example, the court could deem that it has the competence to decide any dispute which has a nexus to the relevant body of MERCOSUR treaty and successor provisions, Council decisions, and Group resolutions. The arbitration panel could also further articulate the limits of its competency, so long as it has the authority to do so within the body of the arbitrators' opinion. This certainly seems logical. The alternative is that the arbitration panel does not have the authority, once the terms of reference are submitted, to determine its own jurisdiction. This is patently absurd.

233. *Id.* at art. 10.

234. *Id.* at art. 9(ii).

235. *Id.*

236. *Id.*

237. *Id.* at art. 11.

238. *Id.* at art. 12.

239. *Id.*

240. *Id.* at art. 14.

241. *Id.* at art. 15.

242. *Id.* at arts. 16 & 17.

243. *Id.* at art. 18.

international law and an *exaquo et bono* power of the arbitrators, if the parties agree.²⁴⁴ The decision of the arbitral tribunal must be written within sixty days and the majority decision is to be adopted.²⁴⁵ The voting is confidential and no dissent is allowed.²⁴⁶ Also no appeal can be raised and the party should comply within fifteen days of the arbitral decision or order.²⁴⁷ Fifteen days are available for clarification of the tribunal's decision, whose response is due back from the tribunal within fifteen days thereafter.²⁴⁸ If the parties do not comply within thirty days, the parties to the dispute can take compensatory measures such as suspending concessions.²⁴⁹ Each party pays for their own costs.²⁵⁰

Track 2 issues are substantively different. These issues are regarding legal or administrative sanctions by one party, as discussed in article 25 of the BP, and have a separate mechanism. This mechanism is for the claims of private persons (natural or legal) as to the restrictive, discriminatory effects, or unfair competition arising from member states action violating the Treaty or its successor, Council decision, or Group resolutions. Affected parties of a state can refer to the national section of the Group their complaint for the national section's review.²⁵¹ If this controversy has not been subject to negotiation or arbitration pursuant to the Chapter II, III, or IV arbitral process above described, then the national section can look for an immediate solution within the Group.²⁵² If fifteen days lapse without further action being taken to resolve the matter, the Group, on presentation by the national section, can review the matter.²⁵³ If the matter is not rejected by the Group, a group of experts can be convened within thirty days. These experts are to listen and hear evidence regarding the particular claims.²⁵⁴ The panel of experts will consist of three members designated by the Group from a list of twenty-four persons.²⁵⁵ Each of the state parties will submit the names of six persons who are well known and deemed objective by them to review the controversy.²⁵⁶

An additional procedure exists for bringing in experts if the parties do not agree. The experts then state their position to the Group and the state party who is the subject of corrective measures. Fifteen days from that date must lapse to go to the arbitral tribunal option.²⁵⁷

For complaints submitted to the OPP, for the Commission's review by national section members, the procedure begins by the complainant state party taking its complaint to the Chairman of the Commission.²⁵⁸ If no decision is reached, the Commission passes the file onto a technical committee which shall prepare a joint opinion on the matter within

244. *Id.* at art. 19.

245. *Id.* at art. 20.

246. *Id.*

247. *Id.* at art. 21.

248. *Id.* at art. 22.

249. *Id.* at art. 23.

250. *Id.* at art. 24.

251. *Id.* at arts. 25 & 26.

252. *Id.* at art. 27.

253. *Id.* at art. 29.

254. *Id.* at art. 29(ii)-(iii).

255. *Id.* at art. 30(i).

256. *Id.* at art. 30(ii).

257. *Id.* at art. 32.

258. OPP, *supra* note 116, at Annex art 2.

thirty calendar days.²⁵⁹ The Commission shall rule on the complaint at its first ordinary meeting although the conclusions of the experts making up the technical committee are not binding.²⁶⁰ Moreover, the experts can submit differing opinions therefore allowing for dissent.²⁶¹ If consensus cannot be reached, the Commission shall submit to the Group various alternatives proposed. The Group shall give a decision within thirty calendar days of receipt.²⁶² If the Group agrees that the complaint is justified, the state party shall, within a reasonable time fixed by the Commission or the Group adopt such measures.²⁶³ In the event of non compliance, the complainants may go to the Arbitral Tribunal.²⁶⁴ Moreover, complainants of the state party may go directly to this latter procedure and bypass the Group, if they so desire.²⁶⁵

E. PROSPECTS FOR CERTAINTY AND STABILITY IN DISPUTE RESOLUTION.

The importance of a dispute resolution mechanism is that it signals to foreign investors the presence of a stable system of protecting their interests. Although attraction of foreign capital is not one of the primary goals of MERCOSUR, it is nevertheless an important unwritten objective. The MERCOSUR dispute resolution mechanism, although at an early stage, should assist in achieving this unwritten objective so long as it is perceived as fair and reasonably efficient in its disposition of disputes. One overarching practical constraint to this discussion is a telling fact; although the dispute resolution system has been in place since 1991, it has apparently not reached a point where an arbitral panel has been convened.²⁶⁶ Rather, disputes, as for example between Argentine-Brazil auto import-exports, have been mediated at the highest political level.²⁶⁷ This example is unlikely to be the case indefinitely, but until an arbitration panel handles a "live" dispute, it is difficult to evaluate the practical effectiveness of the process.²⁶⁸ It is possible to speculate that the operational code is to handle potential disputes through private or public good

259. *Id.* at Annex arts. 2 & 3.

260. *Id.* at Annex art. 4.

261. *Id.* at Annex arts. 3 & 4.

262. *Id.* at Annex art. 5.

263. *Id.* at Annex art. 6.

264. *Id.*

265. *Id.* at Annex art. 7.

266. Reid, *supra* note 6, at 11.

267. *Id.* The automotive industry has been an area of trade policy contention throughout, although it represents one of the biggest areas of growth in intra- MERCOSUR trade. Brazil has placed a 70% tariff on imported cars, so long as manufacturing plants were not present, and a 35% tariff if the manufacturer had a Brazilian plant. Argentina's car manufacturers, many of whom have plants in both locales, became enraged. The result: the dispute was resolved through an overall deal until the year 2000 to dilute production in Brazil. This is accomplished with a duty free rate for Argentine cars into Brazil, provided a 60% MERCOSUR content is present. Argentine manufacturers alone have a 35% tariff applied to their products. Both countries are benefiting from this deal as car manufacturers seek to leverage Argentina's rich market with Brazil's huge market. See Reid, *supra* note 6, at 11. See also Common Market Resolution No. 29/94.

268. See Reid, *supra* note 6, at 11. Telephone inquiries and a conference with the MERCOSUR Administrative Secretariat failed to reveal the presence of any live disputes as well. *Id.*

offices before the dispute is exposed to the light of day. On the other hand, it could also be that five years since the Treaty and less than a year since the CET went into effect, no serious disputes have arisen, which require the conflict to be placed in the dispute resolution pipeline. This seems unlikely; common sense suggests that commercial disputes are a fact of life in commercial relationships. Extralegal or political means are therefore being deployed at the highest level to resolve such issues, which effectively means that the top executive officers of major nations and their aides must step aside from their day to day duties to address such issues, rather than allow the law, through the above decentralized process, to work.

The formal dispute resolution mechanism is broadly modeled on the United States-Canadian Free Trade Area (CFTA approach later used in NAFTA) which has been highly successful in that area.²⁶⁹ For example, both systems allow for early negotiation, followed by review of certain provisions and technical issues such as dumping of goods, and retain binational (or multinational) panels of experts from whom to select as arbitrators. The current OPP mechanism also reflects an important adaptation from the approach used in the BP, namely that arbitral panel decisions are no longer confidential.²⁷⁰ This should allow the development of a body of jurisprudence which can guide potential disputants as to how the legal sources of MERCOSUR are interpreted in the various forms provided. It seems likely that the complaint system of the Commission continues the general process of adjudication of disputes over negotiation as the preferred means for resolution of such complaints. This is not surprising given the fact that the type of disputes brought to the Commission, such as disputes regarding discrimination, are technical in nature. Moreover, the OPP continues the previous framework of allowing broader issues relating to Treaty interpretation and other issues to be reviewed using the BP process. This suggests that these type of issues relating to broader, more fundamental concerns will be subject to negotiation first, reflecting a preference for a more political process.

As shown above, various types of disputes and means of resolving them exists within the MERCOSUR system. Article 1 and article 25 of the BP set forth the parameters of the different types of disputes involving complaints by national sections, as well as the more general controversies relating to interpretation, application or compliance with the Treaty and its successor, documents and decisions of its decision-making bodies, as well as actions of the parties relating to restrictive practices, anti-discrimination or competition law.²⁷¹ State parties also have the opportunity to resolve disputes through negotiation first and bypass the Commission as to disputes relating to interpretation, application and non-fulfilment of the provisions of the Treaty, its successor agreements and actions of article 2 OPP organs. This provides options to a party who prefers the diplomatic or political route over the more technical Commission route for issues of broader scope.

Cases involving interpretation, application, and non-fulfillment of Treaty provision are the kinds of matters which are designed by the Treaty founders to be pursued in a flexi-

269. For an exposition of NAFTA, *see generally*, NAFTA: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS (1994). In particular see Chapter 14 written by H.E. Moyer, Jr., "Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort" and Chapter 15 written by J.P. Bialos & D.E. Siegal, "Dispute Resolution under the NAFTA: The Newer and Improved Model".

270. OPP, *supra* note 116, at art. 39.

ble manner. It is in the interests of any party to try to settle a dispute without engaging any kind of adjudication for time and money is saved. The fact that such matters are reviewed within this type of internal diplomatic process allows the state party to find some kind of face-saving measure before it is faced with the reality of violation of its own rule. At this point, whichever way a party goes, the response is a legalistic system for the resolution of the dispute. But, if an expeditious solution or a more legalistic approach is preferred, then this approach may be taken first.

Some authors have said that subjecting any international trade dispute to a transparent legal process is a bad idea in principle because "wrong" cases are brought forward.²⁷² Wrong cases are those matters in which domestic politics can box in the options of the state member who has taken up the cause of its national industry or sector, even if it has a losing cause. In this situation, the state party is in a lose-lose position for the state party loses in the relevant MERCOSUR body and on the domestic front. However, this type of situation is precisely the point of dispute resolution mechanism. A dispute resolution mechanism's function is to give voice to disputes and provide an opportunity for their resolution.

Parties must be sensitive to the political as well as legal reality. Whether the remaining system is rule based and formally driven by the rules or merely rule-oriented in that politics plays a background role, the problem is how to accommodate losers. In any event, as critics from the above "wrong cases" school point out, the airing of such differences does not appear to have hurt in the development of GATT.²⁷³ Further, over-politicization of the process defeats the purpose of establishing stable, predictable norms. Resolving this tension obviously requires a delicate balancing act at times for disputes escalate and the atmosphere relations between member states becomes poisoned. All in all, the view that open airing of differences is better than the alternative when such differences are unavoidable and their very public nature can lead to a reasonable compromise.

The presence of a dispute resolution mechanism, which offers the opportunity for a body of jurisprudence, can attract foreign investment and in this way, stimulate economic growth and development.²⁷⁴ To the extent that this takes place, nationalism can be subordinated within its proper legal context and the persistent tension between economic conservatism and liberalism can be partially mediated through the dispute resolution process. On the other hand, a MERCOSUR court, with *supranational* power, not come about although it has been proposed.²⁷⁵ It seems a long way away since Brazil supports the idea in principle but is unwilling to cooperate further.

271. *Id.* at art. 21 & BP, arts. 21 & 25.

272. William J. Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L.J.* 51, 67, 78 (1987).

273. *Id.*

274. It should be noted that the Calvo clause or doctrine, the historic Latin American wide legal basis for not allowing foreign investors to use their own fora in international commercial disputes, left the domestic courts of Latin America as the only remaining dispute resolution option. This approach has been modified by the inclusion of arbitral provisions in certain bilateral investment treaties which provide for arbitration in ICSID or under UNCITRAL rules by an impartial international body. See Treaty between U.S. and Argentine Republics Concerning Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, (cited in Diego Cesar Bunge, *Southern Cone Perspectives on NAFTA*, in *NAFTA AND BEYOND* 556 (Joseph J. Norton ed., 1995)).

275. 13 *Int'l Trade Rep.* (BNA) No. 42, *supra* note 10.

It is difficult to argue with an apparent absence of irreconcilable conflict. This is particularly so since the emphasis on liberalization reflects favorably so far on a regime of commercial and legal stability. Still, skeptical observers will no doubt appreciate that the operation of a dispute resolution system can only be revealed when tested. Without such test the best that can be said is that in theory, the MERCOSUR dispute resolution system appears to present a good, but flawed beginning to resolve conflict. The evaluation is therefore positive because no major problems can be identified which have not been worked out through the diplomatic or political process and the formal system, similar to NAFTA and used in a MERCOSUR context, is a reasonably transparent and procedurally fair system with many opportunities provided to the parties to settle their grievances through the appropriate channel which fits their needs. However, a flawed system is evaluated because despite this informal and formal set up, the system has yet to be tested and a centralized system of decisionmaking by the respective Presidents simply does not make sense over the long run because of inefficiencies. Moreover, the degree of real transparency in the system can only be evaluated in a limited way, given the apparent lack of disputes. A real sense of how MERCOSUR decisions are respected in member states can be evaluated after a legal test. Until then, the ways in which politics affects dispute resolution must be watched closely to see what types of informal or formal norms or custom develops as the operational code for dispute resolution.

V. The Outward Expansion Dimension.

A. POLICY CHOICE LINKAGES WITH NORTH OR SOUTH, OR A MIDDLE WAY .

Even if the legal rules generated are convergent and institutions are in place to support the process of legal reform, MERCOSUR will not thrive unless it can expand and grow. In addition to the 40 percent growth in intra MERCOSUR trade during the 1990-95 period, the rise in extra-MERCOSUR trade is important.²⁷⁶ Such external trade growth depends in part on how MERCOSUR fits within a global web of emerging international relationships with other preferential trading agreements and ad hoc international ties. Thus, the integration problems and prospects of MERCOSUR depend on the external dimension as part of a world wide regional integration phenomenon. The core issue is whether the architecture of MERCOSUR is sufficiently open to create trade, and if so, whether the right kind of trade policy is in place to support it.

In recent years, leading trade scholars have analyzed the costs and benefits of economic integration.²⁷⁷ Scholars have focused on the relative merits of trade models favoring a New International Economic Order (NIEO) made of South-South integration alliances to a North-South integration model. These bilateral alliances and preferential trade agreements

276. See Reid, *supra* note 6, at 6. This is the theme of the De Jonquierie article, *supra* note 14, discussing the IADB-Yeats report on the perceived tradeoff between internal and external trade growth, particularly with respect to the capital goods growth internally; see also M. Schiff, Small is Beautiful (IMF Working Paper No. 1668, 1996) (impact of country size, market share, efficiency and trade policy).

277. Cf. Melo & Panagariya, *supra* note 26; Hudgins, *supra* note 27.

are permissible exceptions to the GATT-WTO trading regime under certain conditions.²⁷⁸

In basic terms, the prevailing view is that the South-South integration alternative has proved weak. The empirical evidence shows that South-South linkages generally combine weak economies with limited international bargaining power together without producing sufficient economies of scale.²⁷⁹ The focus now turns to whether North-South integration can counter these weaknesses by providing complementary market access to goods and services without producing adverse effects from economic dependency. MERCOSUR appears to be on a middle path between the above two broad models by seeking world wide linkages to expand trade options rather than aligning itself firmly within any of the above approaches.²⁸⁰ Such a middle way would have some of the characteristics of both North and South alliances and their fit within a particular model would depend upon the specific bargaining issues and the configuration of products to be sold. An analysis of the economic and legal framework to implement MERCOSUR's external trade policy is discussed below along with an exposition of the current trend and discussion of which policy alternative may be preferable.

B. REGIONAL ECONOMIC AND LEGAL FRAMEWORKS FOR INTEGRATION WITH THE NORTH, SOUTH, AND A MIDDLE WAY.

Three core linkage alternatives exist which occur across the hemisphere: NAFTA, FTA's, and selective linkages across Latin America. Also, the possibility of an Atlantic linkage exists through increased cooperation with the EU and the possibility of a more formal linkage, most probably an FTA, after the year 2005. Lastly, a Pacific linkage exists through the possibility of trade pacts with ASEAN and with Japan in a bilateral deal.

These linkage alternatives do not break down in a simple North-South, South-South dichotomy. Rather, they are mixed alternatives which are formed more on geographical lines than on a more developed-less developed country basis. However, the dichotomy still persists for the possibility of trade linkages with the United States, E.U., and Japan represent deals with states of the North generally (exception of Mexico in NAFTA), while the possibility of increased linkages in the South is the basic idea behind MERCOSUR's move to bring in its Latin neighbors. The FTAA idea, because of the presence of North and South states, is obviously mixed as is the ASEAN alternative. Therefore, the potential alliances described below should be viewed with respect to how they fit within the old paradigm of North-South and South-South, or whether they represent a potentially new departure of a middle way formed along geographic and specific product lines in which combinations of comparative advantage lie. By combinations of comparative advantage, this author refers to trade deals in which each party can use their respective positions to sell goods which they can produce more cheaply to sell to the other party in various product niches.

278. See Jackson, *supra* note 25. Cf. J.H. Jackson, *Regulating International Economic Behaviour-Reflections on the Broader Settings of International Financial Markets and Institutions*, in EMERGING FINANCIAL MARKETS AND THE ROLE OF INTERNATIONAL FINANCIAL INSTITUTIONS (??? ed., 1996).

279. *Id.* at 14-18.

280. This is certainly the current trend since MERCOSUR has not committed itself firmly to joining any particular group, but rather is seeking deals with a variety of blocs.

For example, in the classic case about which David Ricardo talked Portuguese wine was exchanged for British textiles, thereby allowing each country to specialize in a particular good.²⁸¹ As a consequence, each country could sell better products because the production of its specialty good was better and cheaper. In the context of regional trade deals, the same basic logic holds, except that it is carried to another level of complexity. At the regional trade level, many more goods exist and countries will seek special favors for certain industries, regardless of whether it operates within a strategy which will result in greater productivity. Thus, the basic underlying logic of the trade deal in a dynamic real world setting mixes the protection of political interests of certain companies and industry sectors or product lines with a general lowering of trade barriers to increase trade overall and in specific goods.

The biggest united markets in the world are the United States, the E.U., Japan, and MERCOSUR, in that order. The biggest markets for MERCOSUR goods varies widely from country to country and product to product. In MERCOSUR itself, Brazil and Argentina form 97 percent of the current internal market.²⁸²

Overall, the E.U. is the biggest trading partner with the United States in second followed by Asia.²⁸³ Nevertheless, the area for the biggest possibility for growth is generally considered to be the U.S. market because it takes up a wider percentage of "value-added" - i.e., manufactured goods. The trade statistics by country and by respective interests vary widely. For example, Brazil is truly a global trader while Argentina's interests are more focused on South America, North America, and Europe.²⁸⁴ Indeed, Brazil represents a major additional market for Argentina (30 percent), while Argentina is but a modest addition to the Brazilian trading regime (10 percent).²⁸⁵ Likewise, the importance of international trade within a given economy varies widely. Brazil and Argentina's economies rely 20 to 24 percent, respectively, on exports as a percentage of gross domestic product.²⁸⁶ Therefore, expanding trade is an important feature of the economic growth equation. Convergence with NAFTA may be the leading option for expanding international trade. Consequently, the first step in analysis is a basic understanding of core NAFTA institutions, its approaches to rules, and its expansion goals. NAFTA is a \$6.5 trillion (1993) free trade area among the United States, Canada, and Mexico.²⁸⁷ While it maintains a weak Secretariat, it has a well established dispute resolution system for trade disputes as well as policymaking bodies and technical committees. The broad policy details are handled by diplomats from all three countries. By contrast to MERCOSUR, NAFTA does not have goals of common external policy setting, including a common external tariff.²⁸⁸ Rather, NAFTA relies exclusively on rules of origin to determine which products come from a particular country and what type of treatment it will therefore receive within the regime.²⁸⁹

281. An excellent discussion of trade theory from Ricardo to the present "new trade theory" is contained in Paul R. Krugman, *Making Sense of the Competitiveness Debate*, OXFORD REV. OF ECON. POL'Y, Dec. 1996.

282. See <<http://www.iadb.org>>, *supra* note 13 (for basic statistics).

283. *Id.*

284. See <<http://www.demon.co.uk>>.

285. *Id.* See also <<http://www.invertir.com>>.

286. *Id.*

287. *Id.*

288. Edwin F. Einstein, *Nafta Trade in Goods*, in NAFTA AND BEYOND 528 (Joseph J. Norton ed., 1995).

289. *Id.* at 61-66.

NAFTA has sought to align itself with trading partners such as Chile, but the U.S. Congress refused to allow Chile in. This refusal was caused in part by other agenda items receiving higher priority by the U.S. Congress and the Clinton administration. This "go slow" approach was partially the result of wariness to expand NAFTA after the crisis precipitated by the 1994 devaluation of the Mexican peso. Chile was predicted to become a full member early in the Clinton second term, but the lack of any high profile Clinton initiatives thus far in this area suggest that such effort has been slowed or stalled by other basic foreign policy concerns, such as getting top officials appointed.

The 1991 Rose Garden agreement is the basis for a 4 + 1 legal framework which allows for cooperation, if not marriage, between the United States, MERCOSUR, and other states. It is expected to provide the basis for a greater FTA and a web of associated affiliations throughout the hemisphere.²⁹⁰ It may also be the primary legal means to bridge the NAFTA FTA with the more sweeping MERCOSUR trade framework. Nevertheless, a number of legal, economic, and geopolitical reasons exists with respect to why such an alliance will not emerge swiftly.

First, the stated objectives of NAFTA and MERCOSUR are not compatible.²⁹¹ MERCOSUR's emphasis on free movement of goods with a CET, and a free movement of capital, labor, and services, as well as harmonization of laws, and macroeconomic policy is broad. The institutional framework is also different in structure, although both groups have weak Secretariats. MERCOSUR is actively expanding its associate membership through its own 4 + 1 agreement process and is actively negotiating with a variety of North and South partners.

By contrast, in article 102, NAFTA states its objectives as the elimination of tariff and non-tariff barriers, trade, and facilitation of cross-border movement of goods and services.²⁹² It also sets forth the promotion of fair competition within the free trade area, the increase of investment opportunities, and a provision of adequate effective protection of intellectual property rights. A CET is not part of NAFTA.

Nevertheless, one commentator has suggested that despite the appearance of the above basic incompatibilities, NAFTA and MERCOSUR have a legal framework which is actually workable.²⁹³ MERCOSUR is, in fact, little more than a free trade area with a partial CET, and its CET will not be in place until the year 2006 for all goods.²⁹⁴ Further, MERCOSUR's goals of free movement of labor and macro-economic and exchange rate policy coordination have been either neglected or minimal. Accordingly, these areas can be explored later and are not stumbling blocks to building NAFTA-MERCOSUR linkages.²⁹⁵ Further, NAFTA rules, to the extent that they are oriented towards liberalization goals, can be incorporated in most basic areas of MERCOSUR. Also, a dispute resolution mechanism exists which closely resembles the NAFTA model.

290. <<http://www.invertir.com>>.

291. See generally Einstein, *supra* note 288; See also Thomas L. Bloodworth et al., *Transborder Supply of and Investment in Services*, in NAFTA AND BEYOND 169, 255 (Joseph J. Norton ed., 1995)

292. See generally O'Keefe, *supra* note 5.

293. *Id.*

294. O'Keefe, *supra* note 5, at 9-12. See also BELLO ET AL., *supra* note 247.

295. O'Keefe, *supra* note 5, at 9-12.

On the other hand, the MERCOSUR institutions are now permanent in nature and may not fit within the NAFTA institutional framework. Moreover, significant sticking points are likely to arise, such as the strong attention which NAFTA gives to intellectual property rights in contrast to MERCOSUR.²⁹⁶ Additionally, MERCOSUR must contend with the fact that U.S. interest group pressure will emerge in areas such as labor and environment because of the lower wage rates and perceived lower environmental standards in the Southern Cone. This was the case in Mexico, prompting the Clinton administration to engage in side accords, prior to signing NAFTA.²⁹⁷ But, hemispheric integration need not go down the NAFTA-MERCOSUR path to become actualized. A potential parallel path exists. Indeed, a legal framework is being established with various working groups involved in the process of attempting a Free Trade Area of the Americas (FTAA) through the Summit of the Americas process.

The FTAA process took off at the December 1995 Summit of the Americas meeting, which involved all the states of the Americas, with the exception of Cuba.²⁹⁸ Various meetings have taken place to follow up the Summit's stated goal of the FTAA by the year 2005.²⁹⁹ U.S. officials have said that they regard the cornerstone of the Summit of the Americas process is a NAFTA-MERCOSUR merger, and as above indicated, convergence here should be a lengthy and difficult process.³⁰⁰ Nevertheless, the U.S. "go slow" approach coupled with MERCOSUR's leadership in the South has created a situation where the prospect of a free trade area from Panama to Tierra del Fuego is much more likely in the near future than achieving such a free trade linkage farther north.

This trend, however, does not diminish the fact that the Summit process, by facilitating trade liberalization, is slowly advancing MERCOSUR's inclusion in NAFTA in an indirect manner. In fact, the United States recently called on Brazil to help move the process forward at the upcoming 34 member Summit at Belo Horizonte, Brazil, by encouraging exploration of each of the two roads and finding a way to smooth these two paths to integration. Whether the result of these efforts is a "pure" FTAA, a NAFTA-MERCOSUR link with ancillary FTA's in various "4 + 1" configurations, or 2 parallel tracks in a series of ad hoc arrangements depends upon Summit as well as bilateral and subregional conversations and negotiations with each other. How some of these secondary linkages within the hemisphere are taking shape is discussed further in section (C.) below.

The next major area of potential links is with the E.U.. The legal framework of agreements which MERCOSUR has with the E.U. reflect that cooperation between the E.U. and MERCOSUR consists of symbolism more than substance at this point.³⁰¹ The text of the agreements reflect a desire to work together in the future, but do not lay out any specific working agreements on trade policy, other than the desire to consult each other. Accordingly, meetings have been undertaken recently between the E.U. and MERCOSUR in order to begin a joint trade liberalization program with aspirational objectives of a free trade zone by the year 2005.³⁰²

296. *Id.*

297. *Id.*

298. *See Beyond NAFTA*, NAFTA L. REV., Winter 1995, at 157.

299. *See Comment and Official Documents: The Miami Summit*, NAFTA L. REV., Winter 1995, at 172-175.

300. 12 Int'l. Trade Rep. (BNA) No. 49, at 2058 (Dec. 13, 1995).

301. *Id.*

302. *Id.* at 2070.

By contrast to NAFTA, difficulties in accommodating the legal frameworks in the E.U. and MERCOSUR are not an issue at present because no real discussion of integration exists. Cooperation is the goal. Nevertheless, the most sensitive sector to MERCOSUR's increased cooperation is the European agricultural sector.³⁰³ Therefore, it seems that the future of E.U. MERCOSUR relations is likely to consist of closer embrace to the tentative one which exists at present: the E.U.-MERCOSUR liberalization plan has more modest objectives set forth than NAFTA.

The United States, for its part, has said it does not oppose greater MERCOSUR-E.U. relations consistent with the WTO. Brazil, in particular, is interested in such a relationship because of its strong exports (primarily agricultural) to the E.U.. Also, the relationship is consistent with Brazil's policy of playing the United States and NAFTA off against the E.U. in order to gain bargaining leverage in trade talks.

The other major trading bloc and group is ASEAN and Japan. ASEAN's objective is likewise based on having closer ties with MERCOSUR, starting with cooperation first and then moving on to greater integration through its own FTA linkage.³⁰⁴ Japan's goals are more modest such as expanding bilateral ties to get better inroads into the MERCOSUR market.³⁰⁵ The ASEAN ties of cooperation, in particular, would not appear to be broadly inconsistent with MERCOSUR's legal framework of trade liberalization.³⁰⁶ The specific details of any future deal would show the extent to which the pact is providing more exemptions to an FTA than covering goods and whether it creates trade.

C. TRENDS AND ANALYSIS OF ONGOING LINKAGES WITH THE NORTH AND SOUTH.

As indicated above, a variety of efforts are taking place simultaneously with NAFTA, individual Latin states, the E.U., ASEAN, and Japan. The current day to day focus is inclusion of LAIA member states on a case by case basis under the 4 + 1 agreement plan. Also, some strong efforts are arising to conclude a free trade deal with the Andean Pact as a whole.

On the other hand, a NAFTA partnership is clearly on the back burner primarily because of Brazil's stated interest in consolidation of MERCOSUR and the fact that it is seeking to form the South American Free Trade Association (SAFTA) as a counterweight to NAFTA. Indeed, Brazil, the economic superheavyweight of Latin America, is using its position as a large and fast growing market to help improve the conditions of reciprocal trade agreements to it and MERCOSUR's favor.

Nevertheless, Brazil is not obstructing LAIA member Venezuela from joining as an associate member, as part of the MERCOSUR 4 + 1 agreement process, nor did it block Bolivia in 1996.³⁰⁷ Indeed, Venezuela is a highly sought after partner since it is rich in petroleum and has strong trading relationships in this regard, particularly with Brazil.³⁰⁸

303. *E.U., MERCOSUR Countries -2-: Said Not An Anti-NAFTA Gambit*, DOW JONES NEWS SERVICE, Dec. 11, 1995, available in Westlaw, Allnewsplus File.

304. *Id.*

305. *Id.*

306. Kamarul Yunus, *Boost ASEAN Ties with MERCOSUR, Malaysia Told*, BUS. TIMES, Apr. 27, 1996, available in 1996 WL 10083681.

307. O'Keefe, *supra* note 5, at 6-7.

308. Jon Mitchell, *Venezuela is on Fast Track for MERCOSUR Entry*, LLOYD'S LIST INT'L, May 28, 1996, available in 1996 WL 6275618.

No simple answer can determine which of the above relationships makes the best sense, given MERCOSUR's legal framework, to achieve further development. Still, the objective of encouraging E.U. and NAFTA competition seems sensible when an economic comparison is made.³⁰⁹ About 30 percent of MERCOSUR's trade is with the E.U.. Nevertheless, most of this trade is agricultural products.³¹⁰ For example, in the case of Brazil, about 60 percent of the goods exported to the E.U. were primary products and only 40 percent were manufactured items.³¹¹ By contrast, 75 percent of the products exported to North America were manufactured goods.³¹² This reflects that inclusion in NAFTA has certain benefits because the market for manufacturing goods may be better in that regional arrangement than in the E.U. and more value (or profit) may be added to manufactured goods than agricultural primary products. Moreover, the E.U.'s preferential agricultural agreements with its former colonies and its own protectionism would appear to constrain the growth of the E.U. MERCOSUR relationship in the long run. Accordingly, at this preliminary stage, the evolution of a legal framework, which can accommodate open doors to both trading blocs, seems to provide the best approach. Consequently, MERCOSUR has selected this approach.

Selective linkages with the South also make sense. To the extent that MERCOSUR can continue to speak with one voice and the market added is consistent with the MERCOSUR trade liberalization policies, this could prove beneficial in achieving intra-MERCOSUR economies of scale, specialization, as well as providing a larger, more attractive partner for trade with the North. This is already happening between Brazil and Argentina as these states, automobile production facilities and foreign investors seek greater MERCOSUR access as a platform to trade in an expanded market. Otherwise, inclusion of southern regimes could bog down MERCOSUR and dilute its core program of liberalization. State intervention could creep in from the side and dilute the core member states' goals. (State interventionism is not, however, always pernicious. For example, protectionism can yield positive benefits in the case of market failure or when concentration yields economies of scale or specialization. This could, under certain trade theories, be argued as the basis for developing special protection for the automobile plants that have a binational base in Brazil and Argentina).

The tension between economic conservatism and liberalism will most likely grow with the inclusion of states whose economies are more protectionist than the existing core MERCOSUR states. An unstable or weak MERCOSUR, may be created by this tension in the long run. Vigilance in policy coherence as to both tariff and non-tariff barriers is essential. In fact, after first reducing tariff barriers, eliminating nontariff barriers to trade is the object of focus in MERCOSUR. Issues like reducing customs paperwork at the respective borders are the next links in the chain toward enhancing efficiency and creating a truly integrated market.

The configurations which are emerging do not reflect a simple North South or South-South pattern. Rather, born of an exception in GATT and the WTO for regional

309. See, for example, O'Keefe, *supra* note 5, at 20-22, for statistics set forth in this economic comparison.

310. *Id.*

311. *Id.*

312. *Id.*

trade agreements, and propelled by stabilization and the success of the Asian model in export-led growth, they represent a new middle way. This approach is new for several reasons. First, selected Latin America states, through MERCOSUR, can use their own strengths as a large market to bargain, rather than doing so in a fragmented fashion. Second, MERCOSUR, can bargain with an unprecedented number of regional blocs on a bloc by bloc basis as well as within the WTO framework (successive tariff reduction, and increasing attention to liberalization in agriculture, and services). This approach is a middle way because it represents a highly fact specific approach to dealmaking rather than a disproportionate, stark reliance on trade alliances with the North or collective arrangements with the South. This middle way, through its creation of open architecture pathways, breaks down the old asymmetries of dependency and creates the opportunity to form relationships on a new set of mutual interests in international development.

Important spinoff benefits arise in that the international community typically demands certain standards of stability and transparency in its business dealings with trading partners. As investors increasingly look to MERCOSUR states as a situs for their businesses where they must have a presence, political stability and some form of democracy becomes more important. Therefore, political stability and democracy become more probable within a region where foreign cash flow is fundamental. Likewise, transparency is likely to follow and make inroads into achieving a more competitive economy by providing certainty and stability in the interpretation of rules (as well as piercing the veil of private business empires in the regulatory dimension of services, such as banking and securities where disclosure is essential to safety and soundness).

However, an important note of caution to the above analysis is needed. A prominent economist recently claimed that the MERCOSUR trading pattern of expanding trade within its borders deserves a sharp rebuke³¹³ because the rapid growth in intra-MERCOSUR trade has been married to protectionism competitors outside the MERCOSUR bloc. This not only represents a retreat from the global trading system, but also potentially promotes protectionism without productivity gains by providing a false sense of progress through the new regional trade growth. The long term effect may be to induce industries, which are effectively importing to substitute within a broader market (e.g., the old policy of favoring domestic entrepreneurs or the state with selected multinational alliances over true liberalization).

The counterargument to this perception is that it begs the question for Brazil and Argentina were peripheral players in the late 1980s and 1990s as they fashioned this new strategy of integration. Even if the rise in trade growth now is disproportionate due to capital goods investment it is a net gain and foreign investment continues to pour in. Indeed, MERCOSUR could do worse. The real danger maybe whether the incipient overall level of protectionism reaches the level of returning these member states to the pernicious trends of the historical cycle of conservatism-liberalism.

So far, it seems that this danger is present and that caution must be applied by domestic and national authorities to prevent the economist's premise of (over)protectionism to

313. See De Jonquieries, *supra* note 14.

become the promise of a closed MERCOSUR which stagnates. Therefore, strong moderating institutions and leadership, on the MERCOSUR and domestic level, as well as international discipline to strengthen the hand of liberalizers in these regimes are needed to prevent some of the worst tendencies of MERCOSUR to become embedded social realities. As the above analysis shows, various legal frameworks are in place and are emerging to facilitate expansion of the core. The apparent strategy of seeking the best individual deals possible, without being wed to a particular bloc, is taking place within this framework and should provide a useful building block approach to expansion and development at this stage.

However, the persistent tension between economic conservatism and liberalism must always be kept in mind since regional trading blocs can devolve into protectionist islands and disserve the ability of an economy to become productive. Adding additional member states, as is permissible under the LAIA framework, is not necessarily a guarantee of greater economic strength and the enhancement of further development.